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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

NO. 982.

ALONZO RICHMOND, CHARLES COMSTOCK, THOMAS LORD AND W. HENRI ADAMS, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WILLIAM H ADAMS, DECEASED,

Appellants,

vs.

JOEL D. HARVEY, RECEIVER OF THE MANUFACTURERS NATIONAL BANK OF CHICAGO ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

H. B. HURD,
Attorney for Appellants.

CHICAGO
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY 175 MONROE STREET.
1886

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Appellee.

BRIEF FOR APPELLANTS.

Statement of Facts.

The original bill in this case was an ordinary creditor's bill, filed Feb. 3, 1875, by James Irons against the Manufacturers' National Bank of Chicago, and Ira Holmes, its president, to reach the assets of the bank, and apply them to the payment of complainant's judgment.

It sets out that Dec. 2, 1874, comp't obtained against the bank, a judgment for $12,408.51 upon which *fieri facias* had been returned unsatisfied (R. p. 5.); that the bank was a

** NOTE.—We think the case should be entitled against Agnes F. Irons. Ex., and Andrew H. Foskett, Executor of the Last Will of James Irons, deceased but have followed the entitling of the clerk. Harvey did not bring the suit. He is the Court's Receiver.*

corporation, duly organized under the banking law of the United States; that on Oct. 11th, 1873, it closed its doors and suspended business (R. p. 7.); that Ira Holmes was then its president; that it had "belonging to it a large amount of bills receivable, notes, discounts, money, etc., etc, of great value, to wit, of the value of $1,500,000 or thereabouts (R. p. 8); that it then had actual money and other assets known and treated as cash to the amount of $1,100,000 or thereabouts; that the assets were at the time of said suspension, largely in excess of its liabilities.

That on or about the day aforesaid, the bank, in pursuance of Sec. 44 of the banking act, pretended to go into voluntary liquidation, and that for about six months, went on settling with creditors and settled a large amount of indebtedness of the bank by giving notes made by him as president and guaranteed by him, and also by turning out some of the least available assets, and in some cases paying money; that some of this paper has fallen due and remains unpaid (R. pp. 8 and 9).

That a large amount of the assets of the bank have been converted by Holmes and other parties connected with the bank, to his and their own use (R. p. 10).

That the amount of the available and cash assets so appriated by Holmes to his own use is not less than $250,000; that he also has a large amount of land purchased with the funds of the bank.

That the voluntary liquidation proceeding by Holmes was a sham for the purpose of disposing of the assets in a way most agreeable to the wishes and interest of Holmes and those in his interest, and to defraud complainant and other creditors of the bank (R. p. 12).

That after the bank went into voluntary liquidation, Holmes acting for the bank, redeemed its "circulating notes" ($438,750), and settled with the United States treasurer "in the manner required by law," and received the bonds which had been deposited for their redemption ($500,000), which he is using to his own private purposes (R. pp. 14 to 16).

That the capital stock was all paid up ($500,000). The

bill gives a list of shareholders, but does not make them parties (R. p. 16).

The Manufacturers' National Bank and Ira Holmes are the only defendants (R. p. 16).

It prays discovery of assets of bank, and that Holmes be required to deliver the same into the control of the court, and that "*so much thereof as may be necessary for that purpose be applied to the payment of the amount due upon said judgment of complainant in full, both principal and interest*" (R. p. 18).

Also prays that the bank and Holmes be enjoined from disposing of property and from doing any act to enable *other creditors* to obtain any of the bank's effects and for a receiver (R. p. 19).

Demurrer.—To this bill Holmes and the bank demurred on the ground *inter alia* that a creditor's bill would not lie, and that a receiver could only be appointed by the comptroller of the currency (R. p. 35).

Amended bill filed Oct. 5, 1876, (R. p. 66.)

James Irons filed an amended bill adding as new defendants the stockholders of the defendant bank. It does not purport to be "on behalf of complainant and all other creditors of the association," and is not brought under the amendatory act of June 30, 1876, but following the frame and design of the original bill is an ordinary creditor's bill on behalf of the complainant and such creditors as had already interpleaded, of whom there were several.

It reiterates the principal facts stated in the original bill, except that it makes the positive allegation that the bank suspended payment and "went into voluntary liquidation in pursuance of the provisions of the banking act" (R. p. 68); that by reason of this fact a receiver of its effects was never appointed by the comptroller of the currency, and that the comptroller refused on application to appoint one. It alleges that while the bank was contemplating insolvency and was insolvent, appellant Comstock (among others) combining with Ira Holmes, surrendered and delivered up to him 100 shares of his stock, that it was not so done "*until the bank had suspended payment and gone into voluntary liqui-*

dation" (R. p. 79); that the stock was purchased, if at all, for the sole benefit of Holmes, with the money and assets of the bank and to relieve the stockholder from liabilities on his stock; that the stock was never in fact canceled or transferred; that the purchase and cancellation of the stock was made to defraud the complainant and other creditors of the bank. It contains interrogatories, among which are, (6th) requiring defendants to state what transfers or sales of stock were made after the bank suspended payment; (7th) what transfers or sales of stock were made after the bank went into voluntary liquidation; when, where, by whom and to whom such transfers or sales were made, and the consideration thereof, and fully and particularly how the same were made. (R. p. 83.) The defendants were further required (R. p. 90) to make full discovery of all their acts and doings with and concerning the bank and the capital stock, and of the number of shares held by each of them at the time the bank suspended, and of the pretended sales and transfers of stock after that time.

The oath of defendants is not waived.

This bill prays among other things that all sales and transfers of stock to Ira Holmes or to parties in his interest, after the bank had become insolvent and suspended payment, may be set aside and be decreed to have been made in fraud of complainant and other creditors (R. p. 86), and that those who had received the effects of the bank for their stock so sold and transferred after the bank had so suspended payment, be decreed to hold such effects in trust for the creditors of the bank, and upon the respective amounts being ascertained, they be decreed to pay the same to creditors thereof, or to such persons as the court shall order (R. p. 87). That an account be taken of all the present indebtedness of the bank.

That an account be taken of the amount due the complainant, and *other judgment creditors* of the bank *who have been made parties to this proceeding by interpleader or otherwise, and that complainant's judgment be decreed to be a first lien* upon all the money, property and effects of the bank dis-

covered by this proceeding. That an account be taken of the amounts due from each of the defendants to complainant and the judgment and other creditors of the bank as stockholders, upon the basis of the number of shares of stock held by them at the time said bank suspended payment; that a complete account be taken of all sales of stock after suspension, and the amounts received by the stockholders therefor; that such of the defendants as shall be found liable upon their stock liability under the banking act, and such as are found liable for assets received on such transfers of their stock, be decreed to pay such amounts into court or to the receiver appointed by the court, and that *out of the fund so created the complainants' judgment be paid in full*, and the balance distributed among other creditors of the bank in such way and manner, as the court shall direct. (R. p. 89.)

James Irons having died March 17, 1877, the bill was revived in favor of Agnes F. Irons and Andrew H. Foskett, executors. (R. pp. 129, 152.)

Motion to strike amended bill from files. (R. p. 112.) Alonzo Richmond and others moved to strike this amended bill from files for the following reasons:

1st. The amended bill is based upon a different ground of complaint from that of the original bill.

2d. Amended bill is inconsistent with prayer of original bill.

3d. Relief has been had under original bill and such relief and the facts on which it is founded are inconsistent with allegations and relief prayed in amended bill.

4th. Amended bill is premature.

5th. The matter and relief sought are only appropriate subject of a supplemental bill.

This motion was overruled and defendants ruled to answer.

Answers and demurrers. — The answer and demurrer of Thomas Lord (R. p. 298) admits that the bank was organized under banking act with $500.000 capital. Shares $100 each; that the bank suspended about

September 22, 1873. Whether it was insolvent, he is unable to state, but is informed by original bill and otherwise there were large assets—sufficient to pay the debts; admits bank went into voluntary liquidation; admits that a large amount of indebtedness had been settled by Holmes, acting as president of the bank; admits that he was owner of stock when bank suspended, which he still continues to own, but was not one of its officers; does not know the exact date when the bank went into liquidation; knows nothing about sales of stock at the time or after the suspension; denies having any assets of the bank.

As to so much of the bill as seeks discovery of the amount of stock owned by him, or seeks relief on his stock liability, he demurs, on the following grounds (R. p. 305):

That no such relief was asked by original bill.

That the original bill was to reach assets of the bank which were by it alleged to be in existence; that Joel D. Harvey was appointed receiver of such assets, and took possession of same; that the relief prayed in that bill was based upon the allegation that such assets exceeded the liabilities of the bank, and in these respects the amended bill makes a case contradictory to and different in its nature from the case made by the original bill.

The answers and demurrers of Wm. H. Adams (R. p. 310), Alonzo Richmond (R. p. 336 and 451) and Charles Comstock (R. p. 366) were substantially the same except that *Charles Comstock*, in answer to that part of the bill which alleges that he sold and transferred 100 shares of his stock to Ira Holmes after the bank suspended and went into liquidation, says (R. p. 369); that in 1872 he was the owner of 150 shares of the stock, that on the 8th day of Febraary, 1873, he sold, assigned and delivered 50 shares of said stock to Ira Holmes, and about June, 1873, he sold assigned and delivered 50 other shares to Preston C. Mayward; that at the time of the said sales of stock, the bank was carrying on its regular business of banking, and was in fact solvent and fully able to pay its debts, and as he is informed and believes, not indebted to

any of the present creditors of the bank; that afterward, on 23d Sept., 1873, he sold, assigned and delivered his other 50 shares to Ira Holmes, receiving in payment certain notes of one Wm. Patrick payable to Holmes and secured by mortgage on real estate; that those notes were the individual property of Holmes and not assets of the bank; that the bank suspended during September, 1873, that he has no knowledge of the exact date when the bank suspended or went into voluntary liquidation, or what meetings, if any were held, or of the time, or place or persons present at such meeting, (R. p. 372); none were held, to his knowledge before the bank went into voluntary liquidation; that he has no knowledge when it first came to the knowledge of the officers and stockholders; that the bank was insolvent and would be compelled to suspend, if such facts ever did come to their knowledge, except that he is informed by the original bill, the bank never was insolvent, and he was not informed that said bank had suspended until after that step had been taken. That he has no knowledge as to what, if any, transfers or sales of stock were made after the bank suspended payment, or as to the time or place, or parties, or consideration of such transfers or sales, if any, except as in his answer before stated. To the 13th interrogatory (R. p. 374½) he says, that as to the purpose of the sales and transfers of stock before or after the bank suspended he has no knowledge, except that as to the sales made by himself, the same were made in good faith.

Transfer of Comstock's stock on books.

The stock books (R. p. 1179) show that fifty shares of Mr. Comstock's stock were transferred to Ira Holmes Sept. 23d (three days before the bank suspended), and fifty more Sept. 24th, and that fifty shares were canceled Sept. 24, 1873. Holmes testifies (R. p. 825) that this entry must mean canceled and transferred to the purchaser; that when these shares were transferred to him, Sept. 23d and 24th, the bank was continuing to do business in the regular course; that none of the transfers by Comstock to him were made in an-

ticipation of failure, or with any idea that there was trouble with the bank (R. p. 826). That he gave Mr. Comstock a good price for his stock. For the last fifty shares he turned out Patrick notes secured by mortgage, which were paid. (R. p. 827.) The sale of fifty shares by Comstock to Maynard was at the time Buchanan became vice president; that at that time there was "not a particle" of trouble with the bank. (R. p. 825.)

Liquidation.—The bank carried on its business in regular way up to and including the 25th Sept., 1873. (R. p. 808.) At a stockholders' meeting held on that day, it was resolved to put the bank into liquidation, which was done on the 26th. It did not suspend until after the vote to go into liquidation. (R. p. 810.) Up to that time, and after, it was, in the opinion of Holmes and of the special examiner, solvent. (R. p. 809.) Holmes conducted the business of liquidation from the 26th Sept., 1873, until the court appointed Harvey receiver, Feb. 26, 1875. During this time he purchased a considerable number of shares of stock with his own means, believing, as he says, that after the creditors were paid, there would be left to be divided among the stock holders 50 to 75 cents on the dollar. (R. p. 824.)

At the time the bank closed it owed a little over $1,000,000, and at the time Harvey was appointed receiver, all but about $39,000 had been liquidated. (R. p. 809.)

The assets consisted of bills receivable and a small amount of cash which was increased to about $90,000 in the process of retiring the circulating notes and sale of bonds. The notes were retired a few days after the bank went into liquidation (R. p. 810).

The manner of liquidating was as follows (R. p 811): Some of the creditors took in payment of their claims bills receivable, belonging to the bank, some took part in bills receivable and part in cash. Some of these bill receivable were secured by real estate and the security went with the notes. Some of them were notes which the bank held at the time the bank commenced liquidating and some were taken from debtors of the bank after that date and all were

payable at a future date. In some instances the bank, by Holmes as its president, simply indorsed the paper; in others, it undertook to guarantee it. In other cases, the creditors instead of taking paper held by the bank, took Ira Holmes' individual notes, guaranteed by the bank; Holmes executing the guaranty as its president. In the latter case, Holmes would take of the bills receivable of the bank, an amount equal to his notes thus given to its creditors. Whatever was done in making these settlements, was done by Ira or J. A. Holmes, acting for the bank as its president and cashier, and pursuant to such agreements as they could make with the creditors. They received no instruction from the stockholders or directors except that contained in the resolution to go into liquidation. (R. p. 812.)

Ira Holmes testifies (R. p. 811) that these bills receivable were in all cases taken by creditors in full payment of their demands; that there was no case in which there was any other understanding; that all the settling creditors thoroughly understood the situation of the bank, and that it was in liquidation; that the demands of creditors consisted of credit balances and when a creditor settled he took such bill or bills and cash and gave his check on the bank for the amount, the same as if the bank was doing a regular business and the parties should come in and buy so much bills receivable and give a check on another bank.

The books of account are introduced in evidence by the complainants. Mr. Harvey, on his examination by the complainants, testified as follows: "Their process of keeping the accounts, as ascertained by an examination of the books after taking possession, was, they made settlement with A, B & C, turning out notes or bills receivable of the bank. They charged the man's account, balancing the account, and crediting bills receivable account, in that way closing up the account, so the books show all those accounts to have been balanced. In case the bank turned out notes indorsed or guaranteed by them, the books would show the account of that particular creditor settled, and no liability remaining."

Amendment of Amended Bill.

July 23, 1883, the complainants amended their amended bill by inserting after the words "amended bill," the words "*on behalf of himself and all other creditors of the Manufacturers' National Bank of Chicago*," and by striking out of the prayer "that an account be taken of the amount due your orator and the other judgment creditors of the said defendant bank, who have been made parties to this proceeding by interpleader or otherwise, the word "judgment," and striking out of the prayer, "*and that your orator's said judgment be decreed to be a first lien upon all the moneys, property and effects of the said bank discovered by this proceeding;*" also by striking out of the prayer, "*and that out of the fund so created your orator's judgment be paid in full, and the balance thereof be distributed among the other creditors of said bank in such way and manner as your Honors shall direct*," and inserting, "and that the fund so created be distributed among all the creditors of said bank." (R. p. 602.)

Answers.—The same day Richmond, Comstock and Lord filed further answers. (Mr. Adams had died before that date). The answers were substantially alike and set up. 1st, the Statute of Limitation of Illinois as to all the creditors brought in by these amendments. 2d, that the bill was multifarious and not authorized by the act of Congress of June 30, 1876. 3d. E. M. Moffitt and other stockholders were not made parties (R. p. 610). The bill had been dismissed as to them (R. p. 399).

The Statute of Limitations of Illinois, relied upon is as follows:

"Actions on unwritten contracts expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued."

Revised Statutes of Illinois, Chap. 83; § 15.

Interlocutory Decree, July 23, 1883 (R. p. 652).

Finds the bank suspended Sept. 23, 1873; that it went into liquidation Sept. 26, 1873; that Thomas Lord owned 80 shares, William H. Adams owned 240 shares, Charles Comstock owned 150 shares, and Alonzo Richmond owned 100 shares; "that after the bank had become insolvent and suspended payment, certain stockholders of said bank transferred the stock held by them, but that all and each of such transfers were and are in derogation of the rights of creditors;" that the same parties are liable for all debts, etc., of the bank, "to the extent of the amount of the stock standing in their names on 23d Sept., 1873, and before any transfers were made on that day," in addition to the amount invested in such bank.

The decree finds that Wm. H. Adams died June 5, 1882, and orders that the cause proceed against Elizabeth Adams, administratrix.

Refers the cause to Henry W. Bishop, master, to take proof and report:

1st. The amount of debts of bank still unpaid, and amount due each creditor.

2d. The value of the assets, if any, of the bank.

3d. The amount of assessment necessary to be made on each share of capital stock of the bank, in order to fully pay the debts of the bank, and the amount due and payable from each shareholder upon such assessment.

Bill of Revivor against Wm. Henri Adams, administrator *de bonis non* of Wm. H. Adams. (R. p. 670.)

Plea and Demurrer of W. Henri Adams, Admr., filed May 5, 1884. (R. p. 683.) The causes of demurrer assigned were,

1st. That the stock liability, if any there was, against the deceased was personal and did not survive against his estate.

2d. That it does not appear by the bill that the defendant has become the holder of said stock or assumed the liability of a holder thereof.

3d. That the bill does not show a right to revive the suit as to said stock liability.

This demurrer was overruled, and suit ordered revived July 14, 1884. (R. p. 693.) *Opinion* of the court. (R. p. 687.)

The evidence shows that Wm. H. Adams transferred his stock to Jonas Hutchinson October 27, 1873 (R. p. 1173). This evidence was introduced into the case by the complainant June 24, 1879 (R. p. 727). There is no evidence tending to impeach the good faith of this transfer. The questions raised upon this transfer are, what effect has it upon the liability of Adams, administrator, and upon the right of those creditors who after the transfer entered into contracts with the bank. The administrator never became a "shareholder" by actually taking to the stock or by operation of law as the representative of the deceased. The legal title to it being at the time of Adams' death in Hutchinson.

Intervening Petition.

The Third National Bank of St. Louis and Smart & Gudgill filed an intervening petition Feb. 12, 1875 (R. p. 30), and dismissed the same Feb. 14, 1879, and did not again intervene until after the cause was barred by Statute of Limitations.

Joseph Shugart filed an intervening petition Feb. 12, 1875 (R. p. 33.)

Scott & Wrigley filed an intervening petition Mch. 17, 1875, (R. p. 41.)

The First National Bank of Hastings filed an intervening petition Sept. 2, 1878 (R. p. 156).

All the other creditors who have come forward, either by intervening petitions or by presenting their claims before the master have done so since the expiration of five years after the bank went into liquidation and was "closed by the vote of its shareholders" under Sec. 5220 R. S.

The orders allowing creditors to intervene were all granted without notice to the defendants.

The claimants filed with the master affidavits, setting forth their claims, and in a few instances supported them by depositions.

In some cases the claimants filed their own affidavits. In others, their solicitor's. In a number of cases the creditors made no claim whatever, but the receiver made a claim for them through Mr. Mason as his solicitor, whose affidavit says that he "has made a personal investigation of all claims against the Manufacturers' National Bank, and from the evidence introduced in this cause, and from outside knowledge confirmatory thereof, states that the bank is justly indebted to the several persons mentioned in the schedule annexed to his affidavit in the sums set opposite their several names." He does not disclose the nature of this outside knowledge.

These affidavits accompanying the evidence of the claimant's demand, and in connection with it, show the basis of his claim. If the claim had been put into judgment the affidavit states as the amount and date of the claim the amount and date of the judgment. In most instances these judgments were obtained upon the indorsement or guaranty of notes turned out by the bank in settlement or sold by the bank in process of liquidation and drew eight and ten per cent. interest, and include interest at those rates and costs of suit. The following is an instance of this class:

Merchant's Exchange National Bank. (R. p. 782.) Judgment Jan. 6, 1880, for $14,410 on seven notes of S. J. Walker dated Aug. 5, 1873, agregations $10,000, payable fifteen months after date with eight per cent. interest turned out by the bank while it was in liquidation (R. 408), guaranteed by J. A. Holmes, cashier of Manufacturers' Bank.

The affidavit dated 26 Jan., 1884, states that the Manufacturers' Bank is indebted to the Merchants' Bank in the principal sum of $14,410.00 (amount of judgt.) with interest

thereon from Jan. 6, 1880, (date of judgment) at 6 per ct. (R. p. 466.)

If the claim had not been put in judgment and the creditor had taken notes in part or full payment, he based his claim upon the note and demanded interest at the rate therein specified.

The following is an instance of this class:

"National Bank of Lawrence. Note of Ray & Whitney $2,500 dated Feb. 10, 1875, at 8 mos. with interest at 10 pr. ct. guaranteed by Ira Holmes as pt. of Manufacturers Bk." (R. p. 755.)

The affidavit dated Jan. 28, 1884, claims the amount of this note at the rate of 10 per cent. from Feb. 10, 1875. (R. p. 460.)

In those cases, where no paper had been taken in settlement and no judgment had been recovered, the amount claimed was the balance due the depositor at the date of alleged failure.

The following is an instance of this class.

G. F. Stoneham. The affiant in this case is Mr. Mason, and he claims for Mr. Stoneham the amount of his deposit Sept. 22, 1873, $203.73 (R. p. 785), and interest on the same from Sept. 25, 1873, at 6 per cent. (R. p. 1071).

In other cases of the same kind as the above, Mr. Mason, who assumes to act for the receiver, asks interest from March 12, 1875 (R. p. 1073).

The master made two reports. By the first he allowed all claims presented either by the parties themselves or by their attorneys, or by Mr. Mason on behalf of the receiver upon the bases set forth in the affidavits of claims, with interest upon the same to Nov. 1, 1884. We do not call attention to all claims. The above, are presented as representatives of their several classes. The allowances in their claims are as follows:

The Merchants' National Exchange Bank. Judg't, Jan'y 6, 1880 $14,410.00 with six per cent. to Nov. 1, 1884, amounts to $18,574.09, the sum allowed by the master (R. p. 716).

National Bank of Lawrence. Note, Ray & Whitney, dated

Feb. 10, 1875; $2,500 at ten per cent. to Nov. 1, 1884, amounts to $4,730.34, the allowance by the master.

G. F. Stoneham. Deposit, Sept. 25, 1873, $203.73. The master seems to have departed from his rule in this case, as he has allowed only $238.89, unless the printed record is at fault (R. p. 716).

Mrs. H. V. Dunton, who claims $400 with interest from April 18, 1873, seems to have been allowed interest at 6 per cent. from March 12, 1875. Her allowance was $631.20 (R. p. 716).

The class of claims allowed at the request of the receiver, and which there was no evidence he paid, and which no one but himself came forward to claim or prove, amount to $5,000 and upwards.

He also allowed to Gardner & Schuyler for services rendered the receiver $1,725.00. To Mattocks & Mason for like services $1,416.75; to Joel D. Harvey for services as receiver $1,294.59 (R. pp. 715–716).

He found the aggregate indebtedness of the bank to be $368,971.50.

He recommended an assessment of 90 per cent. on the capital stock ($500,000) which amounted to $450,000.00.

He found that Alonzo Richmond owned 100 shares, $10,000; Thomas Lord 80 shares, $8,000; Charles Comstock 150 shares, $15,000, and William H. Adams' estate 240 shares, $24,000; on which a decree could then be entered.

Exceptions to Master's First Report.

To this report Charles Comstock filed the following exceptions:

1st. Because the master reported him liable on 150 shares.

2d. Because no issue was raised in his transfer of stock within five years after the same was transferred upon the books.

3d. Excepts to the claims arising upon guarantees and indorsements made after the transfer of his stock.

4th. For the assessment of 90 per cent. Whereas no claims but Irons' and Shugart's should have been considered.

5th. For assessment of 90 per cent.

6th. This exception names each creditor and the amount found due him by the master, and excepts to the same in detail.

7th. That the master included in his assessment complainant's attorneys' fees.

8th. Master admitted claims accruing upon guarantees and indorsements made by officers of bank after it had gone into liquidation and ceased to do general business. This exception applies to all such claims, whether in judgment or not.

9th. Master allowed claims that had been released by the creditors by their taking, after the bank went into liquidation, paper not yet due belonging to and part of the assets of the bank in payment of their claims.

10th. For allowing claims of Gardner & Schuyler, Joel D. Harvey and Mattocks & Mason for alleged services to receiver.

11th. Allowing costs of obtaining judgments against bank.

12th. Allowing claims in favor of persons who have never prosecuted the same, and who have never made proof of same.

13th. The amount called for is largely in excess of the sum necessary to pay all debts proven.

14th. The master has allowed a large amount of indebtedness against the defendants, and each of them, as of a time when they were not stockholders of the bank to wit: all that upon guaranties and indorsements. (R. pp. 1082–1086.)

The exceptions filed by Richmond, Lord and Adams, admr., are substantially the same, except that Richmond and Lord had not transferred their stock.

Mr. Comstock being also a creditor filed an exception that the finding upon his claim was not in accordance with the stipulation in reference thereto. (R. pp. 1088, 743.)

Exceptions overruled.

The court overruled all the exceptions, but referred the cause back to the master to compute "*from the proofs already taken in the case.*"

1st. The indebtedness of the bank at the time of the failure thereof.

2d. Subsequent actual payments upon indebtedness.

3d. Net amount of indebtedness with interest on same at 6 per cent. from the time of the failure to the present time.

4th. Necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership.

Master's Supplemental Report.

The supplemental report is to the effect that the master found the indebtedness of the bank on the 23d day of Sept., 1873 (the date he assumes as the date of failure), to be $410,064.10; subsequent payments $213,018.47; net indebtedness $197,045.64; interest on last sum to May 21, 1886, at 6 per cent. $149,686.98; total $346,732.62; that 20 per cent. on the last sum, amounting to $69,346.52, is necessary to be added thereto for the expenses of the receivership, making a total of $416,079.11.

The amount required of the stockholders, 83 and two tenths per cent. upon the capital stock of $500,000. (R. pp. 1112–1115.)

This report contains no finding as to the amounts coming to the several creditors, nor any items making up these estimates.

Exceptions to Supplemental Report.

By stipulation the exceptions to the master's first report were to be considered refiled to this report. The appellants also filed the following further exceptions:

1st. That the master had included interest where none should have been allowed.

2d. To the allowance of 20 per cent. ($69,346.52) for fees and expenses of receiver.

3d. That the per cent. required of defendants is excessive (R. p. 1118).

Final Decree.

Overrules exceptions to master's report and finds in accordance therewith:

Decree against defendants severally, that they pay to Joel D. Harvey, the receiver in the cause for the benefit of all the creditors, the sum specified, being 82 2-10 per cent. in the stocks found by the first report to be owned by them (R. pp. 1127–1149).

The decree does not find the amounts due the several creditors, or make any reservation looking to the ascertainment of the same in the future. The only finding in this regard is that in the master's first report.

Time of Suspension.

The original bill alleges that the bank suspended business Oct. 11, 1873. (R. p. 7.)

The answer of the bank and Ira Holmes (under oath of the latter) fixes the date on the 26th Sept., 1873. (R. p. 51.) Says the vote to go into voluntary liquidation was passed Sept. 25, 1873. (R. p. 54.)

Amended bill alleges that bank suspended Sept. 22d. (R. p. 66.)

The answers do not claim to fix the date of suspension or going into liquidation.

The records of the bank show the vote to go into liquidation passed Sept. 25. The circular to creditors is dated Sept. 26, 1873. (R. p. 1186.)

Ira Holmes testifies (R. p. 808), that the bank went into liquidation September 26th, the vote having been taken on 25th, that the bank continued to carry on its business in regular course right up to the time it went into liquidation, up to and including the 25th; that it did not suspend until after the vote to go into liquidation (R. p. 810).

The accounts with creditors given in the record (pp. 730 to 790) show that the bank was receiving deposits and paying out money up to and including the 25th September, as the following examples will show:

Third National Bank of St. Louis.

Receipts—Sept. 23, $9,595.24; Sept. 24, $1,638.22.

Payments—Sept. 23, $149.93; Sept. 24, $50; Sept. 25, $1,093 (R. p. 731).

Grundy County National Bank.

Receipts—Sept. 23, $9,033.38; Sept. 24, $4,378.75.

Payments—Sept. 23, $8,762.16; Sept. 24, $19,144.76; Sept. 25, $50,394.55. (R. p. 745.)

Hide and Leather Bank of Chicago.

Receipts—Sept. 23, $5,000

Payments—Sept. 23, $10,300.97; Sept. 24, $7,378.45; Sept. 25, $3,764.50. (R. p. 749.)

Other accounts in the record show the same thing.

The only pretense of proof to the contrary is the testimony of Joel D. Harvey, who says that he knows the bank suspended Sept. 23, 1873, but on his cross-examination he says the only knowledge he has on the subject is what a United States officer told him. (R. pp. 490 and 493.) Again, he says he had no connection with the bank prior to his appointment as receiver, Feb. 26, 1875, and no knowledge in detail of its affairs, except that about the time of the panic he was consulted a little by Mr. Spink, bank examiner. (R. p. 728.)

Insolvency.

The complainants offered no testimony to sustain their allegation that the bank was insolvent before or at the time it went into liquidation.

The record shows that Ira Holmes bought up large amounts of stock after the bank went into liquidation, and

he testifies that he bought this stock because he believed that, after the creditors were all paid in full, there would be left for the stockholders to divide from fifty to seventy-five cents on a dollar. (R. p. 824.)

Claims on the Basis of Sept. 23, 1873.

In a large number of claims there is no evidence in the record showing the amount due the claimant on the 23d Sept. 1873.

The following are examples of this class.

Charles Goldsberg. The only evidence in support of this claim is a note of Ira Holmes for $960.53 dated Sept. 15, 1874, payable to Goldsberg one year after its date with ten per cent. interest, endorsed "Manufacturers' National Bank of Chicago by Ira Holmes, pt." Upon which judgment had been recovered against Holmes Oct. 7, 1875, and execution unsatisfied.

The record contains the statement that no account appears in name of Charles Coldsberg (R. p. 769). There is no evidence showing that the consideration of indorsement was any indebtedness of the bank.

John Klein. His claim is on a guaranty of Brainard T. Smith's note dated Oct. 28, 1873, payable ten months after its date. No account appears in his name (R. p. 765), and there is no evidence showing that the bank was indebted to him at any time, or what was the consideration of the guaranty.

National Bank of Lawrence.

The book of the Manufacturers' Bank show a balance to credit of this claimant, Sept. 22, 1873, of $11,849.58 and a payment, September 25, of $59.72 and of the remainder $11,-789.86, Oct. 2, 1873.

The claim, therefore, rests wholly upon the guaranty of Ray & Whitney's note of $2,500 dated Feb. 10, 1875, and payable 8 months after its date with interest at 10 per cent. (R. p. 755).

Whether this note represents any part of the payment made Oct. 2, 1873, or if any, how much, does not appear.

The claimant did not offer any testimony as to the nature of this claim.

Claims on which the Bank is not shown to be Liable.

The following may be taken as examples of cases where the evidence fails to show a liability on the part of the bank.

Aaron Wilcox & Co. Their claim arises upon three notes of S. J. Walker dated Aug. 8, 1873, of which the Manufacturers' Bank was a holder and which it sold and assigned to the claimants, at what time does not appear. No account with claimants appears on the books of the bank (R. p. 756–758), and the claimants do not enlighten us by their testimony. They give no deposition. In their petition they say they rediscounted these notes in 1873, but at what time in that year they do not state. (R. p. 381.) They recovered judgment against Walker as maker. (R. p. 529.) No execution was issued on the judgment, and no evidence was offered that the suit would have been unavailing. Evidence of the diligence required by the Statute of Illinois to hold the endorser was not offered.

First National Bank of Hastings.

This claim is based upon the Manufacturers' Bank's indorsement of S. M. Nickerson's note (R. p. 759).

No evidence was offered showing due diligence to collect of the maker, or that the same would have been unavailing so as to entitle the holder to recover against the indorser.

Statute of Illinois Ch. 98, § 7.

"Every assignor * * of every note * * shall be liable to the action of the assignee thereof * * if such assignee shall have used due diligence by institution and prosecution of a suit against the maker thereof * * for the recovery of the money * * provided that if the institution of such suit would have been unavailing, or the maker had absconded * * when such instrument became due such assignee * * may recover

against such assignor * * as if the diligence by suit had been used."

The bills receivable taken in payment.

Ira Holmes testifies (R. p. 811), that in each case where he settled with the creditor and turned him out bills receivable of the bank, it was in full payment of his demand. The creditor gave his check on the bank for the amount the same as if they were doing a regular business, and the parties should come in and buy so much bills receivable and give a check on another bank; that there was no case in which there was any other understanding than that the creditor took the bills receivable in payment of his demand against the bank; that the parties in all instances, understood the situation of the bank, and that it was in liquidation. (R. p. 811.)

As to particular Claims.

Grundy County National Bank.

C. H. Goold, a witness produced by the claimant, testifies that he made the settlement for his bank, and that the notes and papers taken by him "was in payment for the claims of the Grundy County National Bank against the Manufacturers' National Bank." (R. p. 940.)

P. M. Everett & Son.

Holmes says the note taken by them was in part payment. (R. p. 845.)

There is no evidence to the contrary. The claimants did not give any deposition in support of their claim.

Thomas Lazear & Hayden.

Holmes says his note given to these claimants was in pay ment of the amount due them. (R. p. 861.)

There is no evidence to the contrary. These claimants give no deposition.

First National Bank of Hastings.

Mr. Holmes says its balance was "paid either by paper or cash or both."

There is no evidence that the paper taken by this claimant was not in payment. They offer no deposition.

Third National Bank of St. Louis.

Mr. Lionberger, the only witness for this claimant, says (R. p. 888), there was no agreement in reference to taking this paper other than that before I consented to take it. I demanded the bank's indorsement thereon which was done, and the result of inquiries probably made of one other banker than Holmes, which was to the effect that the parties to the notes were of large reputed wealth, and that there was a reasonable prospect of their being paid. But, as I felt and knew that I was not releasing the bank. I was not as exacting as I otherwise would have been, feeling that under the double liability clause, there would be a reasonable prospect of the bank paying its obligations.

First National Bank of Allegan.

Mr. Pritchard says Holmes offered him notes and obligations held by the bank which, after investigation, he refused to take, and he finally took Holmes' note in preference. (R. p. 1013.) He further says that the notes were to represent and continue the original debt against the bank, with the additional security of Holmes' personal responsibility, *the bank by this arrangement securing additional time given in the notes* which would enable the bank, as Mr. Holmes seemed to think without doubt, to collect and invest its assets in time to pay the claim as the notes became due. (R. p. 1016.) He does not deny that the amount was balanced by check as related by Holmes.

Caldwell, Hamilton & Co.

When the bank went into liquidation, the balance to the credit of this firm was $434.71. When the settlement was

made Dec. 31, 1873, it was $1,279.31. The books show that this firm kept doing business with the bank right along between those two dates; that a deposit of $1,000 was made Oct. 28, 1873 (R. ps. 835 and 739). The settlement was made with Charles Henrotin, who took in payment note of McClelland & Jenks for $1,000, due April 20, '74 with 10 per cent. interest, guaranteed by Manufacturers' National Bank, and $279.21 and interest on note, $30.58—300.76 (R. p. 990). Mr. Henrotin communicated his action in the premises by letter, so the understanding is in writing.

Specification of Errors.

1st. The court erred in not sustaining the demurrers of appellants, contained in their answers to the amended bill of October, 1876, for the reasons set forth in the demurrer, viz.: that the amended bill brought into the case a new and distinct cause of action—distinct from and inconsistent with that contained in the original bill and against new and different parties, and that the amendment rendered the bill multifarious.

2d. That the court erred in finding that the bank suspended Sept. 23d, 1873, contrary to all the competent evidence in the case, which clearly shows that it did not suspend until it went into liquidation Sept. 26th, 1873.

3d. That in consequence of their error a wrong time was fixed for determining the liability of the shareholders, and especially of Charles Comstock and for finding the amounts due from them and as a further consequence the amount required of the appellants is greatly in excess of the true amount.

4th. The court erred in overruling the demurrer of W. Henri Adams, administrator, and in holding that the statutory liability of a shareholder extended to him, notwithstanding the decedent had assigned his stock to Jonas Hutchinson long before his death and before judgment fixing a liability upon him.

5th. The court erred in not sustaining each and every of the exceptions to the master's first report, and in confin

ing the parties, upon the second reference, to the proofs already taken in the case, and in the directions to the master, especially those which required the master to "find the amount due when the bank failed," without fixing the date as of the 26th of September, 1873, and in omitting to direct him to find the amounts due the several creditors on that day and also in directing the master to find against the stockholders the master's expenses in the case, generally, while they are not liable for the expenses of the proceeding against the debtor bank.

6th. The second report of the master following literally the order of reference found only gross amounts. It contained no items making up these amounts; no finding as to the amounts due the respective creditors, so that it must be concluded either that there was no finding as to such creditors, or the finding in the first report remains notwithstanding the ruling to the court to the contrary. The court erred in overruling the exception to this report for these and other reasons.

7th. The only finding of the master as to the amounts due the creditors is erroneous and the court erred in overruling the exceptions thereto.

8th. The master included in his allowances to the Third National Bank of St. Louis, a second time two notes, to wit, one of Philpot for $2,000, and one of Smith for $500, that had already been allowed. The court erred in not sustaining the exception of appellants to this allowance.

9th. The court erred in allowing $69,346.52 for expenses of receivership.

10th. The court erred in refusing to hold that claims brought forward after the expiration of five years from the suspension of the bank were barred by the Statutes of Limitations.

11th. The court erred in allowing claimants who had settled their claims after the bank went into liquidation and taken bills receivable therefor to prove their claims as against the appellants, and especially as to against Charles

Comstock and William H. Adams, Adm'r., they having assigned their stock before such settlements.

12th. The decree against the appellants is excessive in amount.

13th. The court should have dismissed the amended bill of complainants.

14th. The court erred in holding Charles Comstock liable: his stock having been assigned before the bank suspended.

15th. There is no finding in the record or decree upon which the money, when paid to the receiver, is to be distributed.

Argument.

No sufficient basis for the Decree.

The first requisite in arriving at a final decree in this class of cases, is the ascertainment of the debts for the payment of which the defendants are liable to contribute. The total can only be found by first finding the items which go to make it up. Each claimant is an independent suitor and must show his right to recover, and the amount of his claim, and the defendants may contest both, the same as if such claimant were the only suitor.

"A person coming in to claim under a decree, whether as "heir or as next of kin, or creditor, or as an individual be- "longing to a class, must commence by bringing into the "master's office a state of facts, detailing the particulars of "his case and the circumstances under which his claim "arises. This state of facts in the case of a creditor com- "ing in under a decree to prove against his debtor's estate, "must be accompanied by an affidavit from the claimant "that the debt remains due. Such an affidavit, however, is "not intended as evidence to the master, in proof of the "debt and must not be used as such. The meaning of the "practice is that a person shall not come here and claim a debt, without giving that assurance that it is due, which "arises from his affidavit, which also, if the debt is contest- "ed, affords a protection against the conclusion from other "evidence that it is due, when the contrary may be within "the knowledge of the party himself, but where the debt is "contested, no attention is to be given to the affidavit."

2 Daniell's Chancery P. and P. 1209 and cases there cited.

"When a person not a party to the suit carries in a claim "before the master under the decree, the party represent- "ing the estate out of which the claim is to be made, has a "right to the benefit of any defense which he could have "made, if a bill had been filed by the claimant in equity, or "an action had been brought at law to establish such claim. "Therefore, as we have seen, an executor may in the mas- "ter's office set up the statute of limitations as a bar to a "claim by a creditor under the decree, provided such claim "was within the operation of the statute before the decree "was pronounced."

2 Daniell's Chancery, P. and P. 1210.

Sherwin v. *Vanderhorst*, 2 R. & M. Ch. R. 74.

Woodyard v. *Palsley*, 14 W. Va. 211, and cases cited in the opinion.

Conrad v. *Buck*, 21 W. Va. 396 (at 411).

Laidley v. *Kline*, 23 W. Va. 565.

"Where the master is satisfied that the claim is properly "made out he marks the state of facts as allowed and it will "then form an item in his report, and the opinion of the "court upon the propriety of the master's determination "may be taken by excepting to the report allowing the "claim."

Daniell's Chancery P. & P. 1212.

"In a suit by one or more creditors on behalf of all. As "every creditor has a right to question the claim of every "other, because it may interfere with his own, and as all "are not before the court at the hearing the plaintiff in the "suit is called upon to prove his debt over again before the "master, though he may have established it here; and I "have known several instances in which the debt, after "having been proved here, has failed before the master, "and ultimately the bill has been dismissed."

Owens v. *Dickenson*, Cr. & Ph. 48.

In the interlocutory decree this proposition was clearly recognized. That decree directed the master to find "the amount due each creditor." (R. p. 657.) The master in attempting to follow this direction adopted a false base. The defendants excepted to his report on this ground.

This exception was in effect sustained. The vice in the master's finding, and the ruling of the court are shown in the opinion of his Honor Judge Blodgett. (R. p. 1123.)

"The report of the master shows that for the purpose of ascertaining the amount due each creditor, he took the judgments which had been rendered in favor of very many creditors against the bank, on the guaranties and endorsements as the amount due such creditors, and has computed interest upon such judgments up to the time fixed in his report for the purpose of determining the amount now due: while in the case of creditors who have not brought suit, the amount due them is ascertained by simply taking their credit balance from the books of the bank and computing interest from the day the bank suspended at the rate of six per cent. per annum. In their suits upon endorsement and guaranties judgment was rendered against the bank for the amount due on the endorsed or guaranteed paper with interest thereon, and often at ten per cent., from the time such paper were given, or from the time it was turned out to the creditors, whereby such creditors have obtained a compounding of interest upon their claims, thus giving to these judgment creditors an unequal claim as against the creditors who have not put their claims into judgment. I am, however, of the opinion that the master, for the purpose of ascertaining the amount due each creditor should have taken the amount shown due such creditor by the books, and after deducting from that amount any payments which were made to the creditor by the bank or collected by him from paper which he accepted, he should be allowed credit for the balance of such indebtedness from the date of the suspension of the bank to the time the account was taken, and thereby all creditors would be placed upon an equal footing. The case will therefore be again committed to the master with directions to ascertain and report the total amount of the indebtedness of the bank at the time of the suspension, and the amount which has been paid on such indebtedness since that time, and to compute interest on the balance of such indebtedness remaining unpaid up to the first day of the present month of May, and report the aggregate amount of the same with a finding as to the percentage which must be assessed against the shareholders, for the purpose of paying such indebtedness together with the costs of the receivership."

The order referring the cause back to the master is near-

ly in the same words as this opinion, except that it confines the master to the "proofs already taken in the case." (R. p. 1110.)

The master's second report is confined to the statement of gross sums, as follows: Indebtedness on the 23d day of Sept., 1873, $410,064.10; subsequent payments, $213,018.46; net indebtedness, $197,045.64; interest from Sept. 23, 1873, to May 21, 1886, at six per cent., $149,686.98; total $346,732.62; twenty per cent. upon the last sum for expenses of receivership, $69,346.52; grand total, $416,079.11; necessary assessment, 83 2-10 per cent.

This report contains no finding as to who the creditors are or the amounts coming to them severally, nor any suggestion how they are to be ascertained. The appellants successfully contested the claimants' right to the amounts found in their favor, as contained in the master's first report. It can therefore hardly be contended that these amounts are to stand. If not, then there is in the record no finding in favor of the individual creditors that could have constituted the items making up the total of indebtedness.

Either the master has misinterpreted the direction of the court or the direction itself is wrong. It was clearly wrong in requiring the master to make his amended report "upon the proofs already taken in the case," for these reasons: 1st, because the proofs did not furnish the data from which such a finding could be arrived at, and 2d, because the appellants were entitled to defend against the claims when they should be made on the new basis, and 3d, the creditors should have been directed to reform their claims and the appellants given the opportunity to meet them on the new ground.

There are many claims that could not be placed upon the bases fixed by the court.

Take for instance, the case of *Charles Goldsberg* whose claim, as made by his attorney (he did not appear personally), is based upon a supposed endorsement or guaranty by the bank of a note of Ira Holmes for $960.53, dated Sept. 15,

1874, and bearing interest at ten per cent., and upon which he had recovered judgment against Holmes as maker, Oct. 7, 1875, for $1,062.44. By the first report it appears that Goldsberg was allowed $1,678.10; that is, the amount of the judgment which includes interest at ten per cent., and six per cent. upon that to the date fixed Nov. 1, 1884. There is no evidence that Goldsberg had any claim against the Manufacturers' bank on Sept. 23, 1873. The record states that no account with him appears on the bank's books; and, of course, it could not appear in what amount the bank was then indebted to him, and it equally follows that the master could not from the proofs in the case, find that he was then a creditor or how much to allow him. Whether this is one of the claims which he estimated in making up the amount of the indebtedness of the bank for which the stockholders are liable to contribute, they had the right to know. If the master included this claim, at what sum did he include it? If at the face of the note then he has allowed a year's interest, more than Goldsberg was entitled to (for the master's calculation of interest is from Sept. 23, 1873); if not at that sum, at what sum did he estimate it?

Take as another instance the claim of the *National Bank of Lawrence*. The claimant bases its claims upon the guaranty of Ray & Whitney's note of $2,500, dated Feb. 10, 1875, bearing ten per cent. interest (R. p. 755). The bank's books showed a balance of $11,789.86 to the credit of the claimant Sept. 25, 1873, and that the account was balanced Oct. 2, 1873. There is no competent proof connecting the note with that account in any manner. Mr. Holmes says (R. p. 848) that he *thinks* he turned out some $6,000 or $8,000 of Ray & Whitney's paper; that they kept renewing it and paying interest (no doubt at 10 per cent.), and paying part of it; that he would not be certain, and he conjectures that this note was given in renewal. If we allow that Mr. Holmes' conjecture is correct, it nowhere appears how much of the principal indebtedness, or how much interest at ten per cent. the note represents, or at what sum the master conjectured it into his estimates. If he put it in at $2,500, in

as much as he casts interest upon the total indebtedness from Sept. 23, 1873; he, in effect, requires the defendants to pay 6 per cent. on that sum for seventeen months' time for which the claimant has already received interest at 10 per cent.

Aaron Wilcox & Co.

We have called attention in our statement of facts, to the want of the necessary proof under the Illinois statute, to charge the bank as indorser in the class of claims of which we present this as a representative. The allowance to these claimants in the master's first report is $17,592.86. The exceptions to that report expressly except to this finding (R. p. 1084), and the same exceptions are refiled to the second report. It therefore was of the greatest importance to them to know whether this class of claims was included in the master's estimate or not.

The claimants founded their claim upon a simple assignment by the Manufacturers' Bank to them of S. J. Walker's four notes amounting to $10,000 and drawing eight per cent. interest. (R. p. 756.) They say they re-discounted them—that is, bought them of the bank. (R. p. 381.) They introduced a judgment obtained against Walker, the maker, Nov. 9, 1874, for $11,006.22. (R. p. 547.) The master's allowance as per his first report could not have been upon this judgment, for these with six per cent. interest would have produced nearly $1,000 less than the sum found by him.

The record expressly states that no account appears on the bank's books with these claimants (R. p. 756).

No execution was issued on the judgment against Walker, and no evidence was introduced to show any of the facts requisite to excuse this diligence. There was therefore no case made to charge the bank.

R. S., Ill. Ch. 98, § 7.
Saunders v. *O'Briant*, 2 Scam. 369.
Carstens v. *Little*, 3 Ibd. 410.
Nixon v. *Weyhrich*, 20 Ill. 600.
Chalmers v. *Moore*, 22 Ibd. 359.

The case of the *Third National Bank of St. Louis*, furnishes a still more striking illustration of the impropriety of the course taken in this case.

Two of the notes turned out to the claimant were in the master's first report allowed twice, making on the bases adopted therein an excessive allowance of $4,276.54. This point will clearly appear by reference to the testimony. Mr. Lionberger, whose testimony was taken on behalf of the claimant, says (R. p. 887) that he represented the claimant as its president in the settlement; that the Manufacturers' Bank was indebted to his bank in the sum of $11,273.74, on which he was paid $5,293 in cash and the balance was secured by the following notes:

B. Philpot	$2.000
Brainard T. Smith	500
Sam'l J. Walker	3.000
Allen & Bartley	500
	$6.000

The claimant introduced four judgments, one on the guaranty of the Philpot, Smith and Allen and Bartley notes (R. p. 730–1), which the master has allowed with compound interest amounting to $5,267.25 (R. p. 714); another on the indorsement of Walker's note, which the master also allowed with compound interest amounting to $5,687.08. (R. p. 714.) These were all the notes taken by the claimant, but for some reason it sued and recovered a second judgment against the bank upon its indorsement (the first was on its guaranty) of the Philpot note, and the same upon the Smith note (Walker's note was only indorsed) (R. 767–8), and the master allowed these judgment also with compound interest, one at $3.439.71 and the other $836.83, thus swelling the claim from $6,000 in 1873 up to $15,230.87 in 1884.

The mistake, no, doubt, arose from the fact that the claimant introduced the two sets of judgments, but it is no less damaging to the appellants. For this fault alone the decree ought to be reversed.

The First National Bank of Hastings took, January 12, 1874, the note of S. M. Nickerson, dated July 7, 1873, for $5,000, payable one year after date, with ten per cent. (R. pp. 759 and 851). The master's first report allows this (or the judgment recovered upon it) at $20,143.64 (R. p. 715). What swelled it to this amount the evidence fails to show, and at what this was figured in the last report can not be told from the record unless we may infer from the large amount of his estimate he put it in at the full $20,143.64.

Will the appellee's counsel say, that inasmuch as the master in his second report has made no finding in these particular cases, it does not certainly appear in the record that he has in his final estimate repeated the errors complained of? If so, we reply, the record ought to be in such shape that it would certainly appear what went to make up these amounts we are called upon to pay, so that the attention of the court could be called to them and such relief granted as equity allows. It would be monstrous to allow a claimant to profit by his own fault. It would be a denial of the well settled rule as stated by Mr. Daniels, that "the party representing the estate, out of which the claim is to be made, has a right to the benefit of any defense which he could have made if a bill had been filed by the claimant in equity or an action had been brought at law to establish such claim."

1 Daniells Chan'y, P. & P. 1210.

The complainants should have made such a case as that this court could see whether the amount the appellants are called upon to pay, is the right amount. We have gone over the testimony with great care and labor and assert with confidence that the master's estimate of unpaid indebtedness exceeds the real amount, including all contested claims, by upward of $50,000. But here again we expect to be met with a reply founded upon the very fault of which we complain—the lack of necessary proof as to the balance due the respective claimants at the time fixed. We are obliged to confess that the record presents such a wide

range for conjecture and so many instances where there is nothing whatever to guide us, that no two persons would be likely to come at the same result. But we say again that it is monstrous that the appellants should be denied justice because the record does not contain the facts from which the court can see where the justice of the case lies.

Allowances in favor of persons who have not made any claim.

The master included in his first report and must have included in his last estimate of indebtedness of the bank some nineteen allowances in favor of persons who have never appeared to make claims. The receiver having discovered in the books turned over to him certain balances standing to the credit of these persons, has taken it upon himself to bring them forward. (R. p. 1072–3.) The affidavit is by Mr. Mason, who says "he is one of the attorneys of the receiver; that from evidence introduced in this cause and from outside knowledge conformatory thereof, he states that the Manufacturers' National Bank of Chicago, is justly indebted to the persons mentioned in the principal sums set opposite their names with interest from March 12, 1875." (R. p. 1072–3). The master has called for the payment of interest on these sums from Sept. 23, 1873.

The claims thus interposed in favor of these persons without their knowledge were first brought forward by Mr. Mason, Jan'y 31, 1884, over ten years after the bank went into liquidation. Whether the persons whose names are thus used to increase the burden attempted to be laid upon the stockholders of this unfortunate bank are dead or alive, have been paid or otherwise satisfied, there is no way of ascertaining. If they had been required to come forward in the way laid down by Mr. Daniels in the passage quoted above, we would have been assured upon these points. The trouble is Mr. Harvey (or rather Mr. Mason,) has mistaken the functions of a receiver. It is not his business to hunt up claimants against the estate placed in his hands, nor to espouse their cause or hire lawyers for them. We had supposed that the receiver was an officer

of the court and that it was his duty to defend the fund and not conduct an attack upon it.

The only safety to defendants is found in the Rules of Practice of Courts of Equity, which regards each claimant as an actor and requires of him, if he would assert a claim, that he should come into court and state the amount and ground of it, and confines him to the case made by his statement upon the well settled maxim, that one can only recover upon the case stated in his complaint and shown by his proof.

1 Daniell's, Ch. P. & P. 856–8.

Allowances to Complainant's Solicitors.

The master in his first report made the following allowances in favor of the solicitors for complainants and claimants; Mattocks & Mason, $1,416.95; Gardner & Schuyler, $1,725.50.

It nowhere appears in evidence that either of these firms had any demand against the debtor bank, or that they presented any claim before the master. The master says they are allowed for some past services as attorneys of the receiver, but no claim or bill or evidence of such services appears in the evidence submitted to the master. We submit that we were entitled to know for what services these amounts were allowed. It sufficiently appears that Gardner & Schuyler were the solicitors of the complainant, Irons, and that D. J. Schuyler of that firm appeared as counsel for the same party, but it nowhere appears that either of these gentlemen rendered any distinct service for the receiver. There appears at page 442 of the record, what purports to be a bill of Joseph Schuyler (which we take to mean D. J. Schuyler), against the receiver for services, some of which appear to have been rendered under the original bill, and in regard to the assets of the bank then in the receiver's hands, with which we think we have no concern. This bill does not appear to have been before the master, and whether it has anything to do with the allowance we are

unable to conclude from the record. Many of the items in it are not such as the appellants are bound to pay, of this nature are the following:

Motion for leave to file amended bill in *Irons* v. *Manufacturers' National Bank*.....$ 15.00
Preparing and filing amended bill..... 150.00
Preparation and argument of demurrers to amended bill..... 500.00
Redrafting and restoring amended bill..... 100.00
Appearance and obtaining order for defendant's to answer same..... 25.00
Examining answer filed by defendants..... 100.00

These charges must have been made upon the theory that the appellants are bound on their stock liability to pay the complainant's solictors fees, or perhaps the equivalent, that the master is bound to champion their cause and consequently to employ solicitors for them.

The firm of Mattocks & Mason have the advantage or disadvantage of having kept out of the record all light as to the nature of their services, except that from first to last they appear as the advocates of claimants, and we presume they take the position that the master is charged with the duty of finding and establishing all possible demands against the fund that is sought to be brought into his hands.

The assumption that the services of these gentlemen to their clients is a service to the receiver, is a mere expedient to swell the recovery against the stockholders.

Allowances to Receiver.

The receiver is allowed for past services $1,294.59, to be collected out of the stockholders. What these services are and when rendered are left to be imagined. Mr. Harvey makes no manifest of them. His only report, filed March 30, 1880, shows a balance in his hands collected from assets committed to his charge of $2,005.41. (R. p. 442.)

After finding the total indebtedness of the bank, for which he finds the stockholders liable, the master adds the

magnificient sum $69,346.52 for expenses of the receivership. It is fair to presume, in the absence of any bill of items, that the allowance for "past services of the receiver and his attorneys," (R. p. 719) was in full to that time, Jan'y 2, 1885. What more he is to do to entitle him to this large sum we are not able to discover. His duties will be confined to receiving the money decreed to be paid to him when it is collected upon executions, and paying it over to the creditors.

Nature of the Statutory Liability.

Does the stock liability cover these all wances? We contend that it does not; that this liability is a security running to the creditors of the bank, and limited by the terms of the statute to the "contracts, debts and engagements of the association," and is not an asset of the bank, or to be treated as if it were. We do not deny that as to the assets of a debtor, a receiver stands in his shoes, and may collect his estate, and be compensated for his services and expenses out of the estate; nor do we deny that as to the assets of the debtor bank in this case, the receiver was entitled to collect, and be compensated out of the same; but as this stock liability did not belong to the bank, no title to it passed to the receiver, and he, as such, had nothing to do with it. This view of the case does not interfere with the right of the court to use the services of a receiver, or of the master or clerk of the court in distributing the money when collected; nor its power to adjust, as between the complainants and those coming in to avail themselves of their out lay, of the expenses of enforcing the liability.

2 Daniell's Ch P. & P. 1213.

Nor do we contend that a creditor who brings in his claim before the master is not entitled to recover his taxable costs against the shareholders, if he succeeds, as he might be compelled to pay taxable costs if he is defeated. What we do contend is that, he is not entitled to have his suit regarded as the suit of the receiver and his solicitor paid as

if he had rendered a service to the receiver. The suit is the creditor's suit and not the receiver's. He is not the real or nominal complainant. The Act of 1876 does not give the action to him, but to the creditor.

2 Daniell's Ch. P & P. 1213.

The rule that a creditor can not recover against a guarantor the costs of his suit against the principal applies to the statutory liability of stockholders.

Bailey v. *Bancker*, 3 Hill, 188.

"Individual liability is repugnant to the law of corpora-
"tions and qualifies, in this case, an exemption which would
"otherwise exist. Stockholders, in such cases, are liable ac-
"cording to the plain meaning of the terms employed by
"the legislature and not otherwise."

Carrol et al v. *Green et al.*, 92 U. S. 509.
Pollard v. *Bradley*, 20 Wal. 520.
Brown v. *Eastern Slate Co.*, 134 Mass., 590.
1 Parsons on Contracts, 143.
Burnham v. *Wellensburg Coal Co.*, 47 Pa. St. 49.
Stedman v. *Everleth*, 9 Met. 114.
Gray v. *Coffin*, 9 Cush. 199.
Chase v *Lord et al.*, 77 N. Y. 1.

"Where a statute imposes a personal liability for corporate
"debts it must be strictly construed, as it is in derogation
"of the common law, and can not be extended beyonds its
"actual terms."

1 Parsons on Contracts, 143.
Stedman v. *Eveleth*, 9 Met. 114.
Knowlton v. *Ackley*, 8 Cush. 93.
Gray v. *Coffin*, 9 Cush. 199.
Chase v. *Lord*, 77 N. Y. 1.
Howard et al. v. *Wilcox et al.* 47 Pa. St. 57.
O'Reiley v. *Bard*, 105 Pa. St. 569.
Thompson's Liability of Stockholders, § 56.
Dane v. *Dane Mfg. Co.* 14 Gray, 488.
Ripley v. *Sampson et al.* 11 Peck. 371.
Bangs v. *Lincoln*, 10 Gray 600.

"The receiver of an insolvent corporation makes his title "through his corporation. He can not, through his ap- "pointment, acquire that which the corporation never had. "He represents the creditors of the corporation in the ad- "ministration of his trusts, but his trust relates only to the "corporate assets. * * He is not a trustee for creditors in "relation to assets which belong to them individually or as "a body. *Bristol* v. *Sanford*, 12 Blac f. 341; *Curtis* v. *Levitt*, "15 N. Y. 44. Neither a receiver, an assignee under a "voluntary assignment for the benefit of creditors, as well "as the insolvent, acquires any right to enforce a collateral "obligation given a creditor by a third person, for the pay- "ment of the debt of the insolvent."

"Whether this liability be designated as a 'statutory "liability,' or a 'collateral statutory liability,' or a 'statutory "penalty,' it was not created for the benefit of the bank, "could not be collected. sold or released by the bank, was "in no respect under its control. But on the other hand it "belongs solely to the creditors, and is under their control."

Jacobson v. *Allen*, 12 Fed. Rep. 455:
Story v. *Furman*, 25 N. Y. 215.
Farnsworth Rec. v. *Wood*, 91 N. Y. 308.
Dutcher, Assignee in Bankruptcy v. *Marine National Bank*, 12 Blackf. 435.
Bristol, Assignee, etc., v. *Sanford*, Ibd. 341.
Hanson v. *Donkerslay*, 37 Mich. 184.
Wright v. *McCormick*, 17 Ohio St. 86.
Umstead v. *Buskerk*, 17 Ibd. 113.
Lane v. *Morris*, 8 Ga. 468.
High on Receivers, § 205 and note.
Corporation Cases, Vol. 1, Pt. 1, 91,
Hewett v. *Adams et al.*, 50 Me. 271.

Mr. Justice Nelson delivering the opinion of this court in *Hawthorne* v. *Calef* treats this liability as a *guaranty to the creditors*. He says: "Now, it is quite clear that the per- "sonal liability clause in the charter, in the present case, "pledges the liability or guarantee of the stockholders to "the extent of their stock, to the creditors of the company,

"and to which pledge or guarantee the stockholders, by "subscribing for stock and becoming members of it, have "assented. They thereby virtually agree to become security "to the creditors for the payment of the debts of the com- "pany, which have been contracted upon the faith of this "liability."

Hawthorne v. *Calef*, 2 Wal. 10.
U. S. v. *Knox*, 102 U. S. 422.
Brown v. *Eastern Slate Co.*, 134 Mass. 590.
Robinson v. *Lane*, 19 Geo. 337 (at page 346).
Basshor & Co v. *Forbes*, 36 Md. 154 (at 166).
Hanson v. *Donkersley*, 37 Mich. 552.
Powell v. *Eldred*, 39 Mich. 552.
Moss v. *McCollough*, 5 Hill, 131.
Dauchy v. *Brown*, 24 Vt. 197.

The liability is not that of a partner.

Sullivan v. *Sullivan Mfg. Co.*, 20 S. C. 79.

This court, in *Bank* v. *Kennedy*, 17 Wallace, 19, say: "Stockholders are not ordinary debtors of the bank, but are "rather in the light of creditors, their stock being regarded "as a liability (of the bank). They are entitled to all the "surplus that remains, if any remain after the payment of "the debts. They are only conditionally liable for those "debts *after all ordinary resources of the bank have been ex- "hausted.*"

In *Brown* v. *Eastern Slate Co.*, 134 Mass. 590, the court say: "The statute does not create a chartered partnership which "remains a partnership and contracts as such, although "granted certain powers. It does not make or leave the "members primary contractors or debtors. It creates a "corporation out and out, and then imposes a secondary "and subsidiary liability upon the members for its debts or "contracts. * * The corporation is the only promissor "or debtor; it alone breaks the contract by its failure to "pay. * * The liability of the stockholder is no part of "the original undertaking but is a consequence attached by "law for its breach." The judgment against the company was held not to conclude the stockholder on the ground that his liability was that of a surety.

The force of this proposition was acknowledged by the learned judge who tried this case; even he calls the stock

liability "a guaranty or assurance" to the creditors of the bank (R. p. 690;) but he undertakes to escape its effect by an unwarranted assumption as to the meaning of the act of June 30, 1876. An assumption, which we think has carried, the case astray not only upon this but upon several other points made by the appellants. We quote from his opinion (R. p. 1122.)

"There are many cases cited in the briefs of counsel showing, in substance, that the liability of the shareholder of a corporation, is not an asset of the corporation, and that such individual liability is to be enforced by suit brought by the creditors directly against the share holders. This rule was announced by Judge Woodruff in *Jacobson* v. *Allen*, 12 Fed. Rep., 455; *Story* v. *Furman*, 25 N. Y., 231 and many other cases which might be cited. The National Bank Act, however, specifically provides that a receiver, when appointed by the comptroller, shall enforce the individual liability of the shareholders, pay the money over to the treasurer of the United States, subject to the order of the comptroller of the currency, and that the comptroller shall, from the proceeds of the property of the bank, and the proceeds of the individual liability of the shareholders make equal and ratable dividends to the creditors; and as the act of June 30, 1876, provides that the individual liability of the shareholders may be enforced by a bill in equity, filed by any creditor in behalf of himself and all other creditors, it implies that a fund obtained by the enforcement of the statutory liability of the shareholders, shall go in with the general assets of the bank, and be equally distributed to all. As the law stood prior to the passage of the act of June 30, 1876, the individual liabilities could only be enforced through a receiver appointed by the comptroller of the currency (*Kennedy* v. *Gibson*, 8 Wall 498), and in providing for the enforcement of this liability through the medium of a bill in equity, brought by a creditor, the rule of this distribution is not changed, and it is clear that each creditor is to share alike in the proceeds of such bill."

We insist that the remedy provided in the banking act through the comptroller, has nothing whatever to do with that given to a creditor suing in behalf of himself alone or on behalf of himself and all other creditors, under § 2 of the Amendatory Act of 1876, and has no more influence

upon such an action than if that special statutory remedy had never been given, and such we submit has been the view of the learned judge as expressed by him in this same case upon former occasions.

Irons v. *Manufacturers' Nat. B'k*, 6 Bissell 301.

The opinion referred to was delivered in 1875, before the act of June 30, 1876, and before the filing of the amended bill, making the stockholders parties and where the creditor was pursuing only the assets of the bank. It was then contended by the bank and Holmes that the remedy was through the comptroller, but the court held that the statutory remedy did not apply except in cases of the non-payment of the circulating votes. Inasmuch as these had been retired in the course of liquidation, it did not apply to this case, and therefore the comptroller had no jurisdiction, but that a court of chancery possessed the power to lay hold of the assets and administer them; and the case of *Kennedy* v. *Gibson*, 8 Wal. 498, was commented upon and held not to rule this case. It was upon this view of the case that the court appointed Mr. Harvey, receiver.

The banking act as it stood before the amendment of June 30, 1876, was silent as to the way of enforcing the shareholder's liability except in case the association refused to pay its circulating notes (§ 5234). Its enforcement in any other case was left untouched by statutory regulation. The amendatory act, § 1, extended the remedy through the comptroller to cases where the "association shall be dissolved and its rights, privileges and franchises are declared forfeited as prescribed in § 5239," and in such cases it expressly gives him power "to appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders as provided in § 5234." But by § 2, a distinct provision is made for the case of an association in liquidation under § 5220—the case of the manufacturers' bank. That provision is that "the individual liability of the shareholders provided for in § 5151 may be enforced by any creditor of such association by

bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof" in the Circuit Court of the United States, in the district where the bank is situated.

While § 1 clearly applies the remedies in the original act to the cases therein mentioned, § 2 refers the creditor of a bank in liquidation to an entirely different remedy, viz.: The well known equity proceeding of a bill by a creditor on behalf of himself and all other creditors, pursuant to the well known rules of practice of the court of chancery in such cases. Not only is there no intimation in the statute that Congress intended to change the practice of the court of chancery or introduce a new principle to control its action, but there is a strong implication contained in the reference of that class of cases to a particular kind of creditor's bill, that the remedy was intended to be in accordance with the rules and principles applicable to that kind of proceeding. The provision of the statute that the comptroller shall, in the cases within his jurisdiction, enforce the individual liability through his receiver (which he does by action at law against the shareholders severally, and turning the avails with the general assets into the United States treasury subject to his order,) is an arbitrary mode of proceeding confined to the statutory remedy given through him, and not intended to change in any respect the nature of the liability.

If their is any implication to be gathered from the statute as to the nature of this liability, it is that it belongs to the creditor, because it allows the creditor to enforce it by a suit directly against the shareholders alone, not in connection with, or through, the association. It does not require that the association should be joined in the action. Act of June 30, 1876, § 2.

Effect of going into Liquidation.

Sec. 5220 R. S., reads as follows: "Any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock."

The amended bill charges that the bank went into voluntary liquidation (R. p. 69), and the decree finds that it did so on the 26th of September 1873. (R. p. 653).

From that date the bank was "*closed,*" except for the purposes of liquidation. The act of closing fixed the rights of the creditors and liabilities of the shareholders. The implied authority to the officers of the corporation to make "contracts, debts and engagements," for which the shareholders should be liable under the statute then closed. The only business of the association and its officers from that time was to liquidate.

We adopt the language of this court in *National Bank* v. *Insurance Co.*, 104 U. S., 54, (at 74.)

"The very purpose of the liquidation provided for, is to "pay the debts of the corporation that the remainder of the "assets being reduced to money may be distributed among "the stockholders." * * * "The proceeding prescribed "by the law seems to resemble not a technical dissolution "of a corporation without any saving as to the common "law consequences, but rather that of the *dissolution of a* "*co-partnership, which nevertheless continues to subsist for the* "*purposes of liquidation and winding up its business.*" Chancellor Kent, (3 Kent's Com. 63) states the doctrine as to co-partnerships. "When a partnership is actually ended by "death, notice or other effectual mode, no person can make "use of the joint property in the way of trade or inconsist-"ently with the purpose of settling the affairs of the part-"nership and winding up the concern. The power of one "partner to bind the firm ceases immediately on its dissolu-"tion, provided the dissolution be occasioned by death or "bankruptcy, or operation of law, though in cases of volun-"tary dissolution due notice is requisite to prevent imposi-"tion on third persons who might continue to deal with the "firm. The partners from that time become distinct per-"sons and tenants in common of the joint stock. One part-"ner can not indorse bills and notes previously given the "firm, nor renew a partnership note, nor accept a bill pre-"viously drawn on it, so as to bind it. He can not impose "new obligations upon the firm, or vary the form or char-"acter of those already existing. If the paper was even in-"dorsed before dissolution, and not put into circulation "until afterward, all the partners must unite in putting it "into circulation to bind them."

See, also, *Conrad* v. *Buck*, 21 W. Va. 396, which is directly in point.

This doctrine is recognized by this court in a case where a bank was closed by the comptroller:

"The business of the bank must stop when insolvency is "declared: Rev. Stat., Sec. 5228. No new debt can be made "after that. The only claims the comptroller can recognize "in the settlement of the aff. irs of the bank are those which "are shown by proof satisfactory to him, or by the adjudi- "cation of a competent court, to have had their origin in "something done before the insolvency. It is clearly his "duty, therefore, in paying dividends, to take the value of "the claims at that time as the basis of distribution."

White v. *Knox*, 111 U. S. 784.

It follows from this proposition that neither the giving by the bank of new paper, after it closed, or the suffering of judgment after that time upon a subsisting indebtedness, is such a "contract, debt or engagement of the association" as binds the shareholders on their stock liability.

A judgment against the corporation is not binding on the stockholders—is not even *prima facie* evidence of indebtedness of the corporation as to them. They are neither parties nor privies to it. They stand in the same relation to it that heirs do to a judgment against an executor or administrator. Whether they are considered as sureties for the company or principal debtors the rule is the same.

Miller v. *White*, 50 N. Y. 137.
McMahon v. *Macy*, 51 N. Y. 155.
Moss v. *McCollough*, 5 Hill, 131.
Laidley v. *Kline*, 8 W. Va. 218 (at 330).
Mason's Devisees v. *Peter's Adm'rs*, 1 Munf. 437.
Foster v. *Crenshaw's Ex'r*, 3 Munf. 520.
Chamberlayne v. *Temple*, 2 Rand. 396.
Shields v. *Anderson*, 3 Leigh. 736.

Parrott v. *Colby*, 6 Hunn. 55; affirmed by the Court of Appeals, 71 N. Y. 597, on the opinion given below.

McDowell v. *Goldsmith*, 24 Md. 215.
Trippe v. *Huncheon*, 82 Ind. 307.

Larrabee v. *Baldwin*, 35 Cal. 155.
Wheeler v. *Miller*, 24 Hun (N. Y.), 541.
Union Bk. v. *Wandos M. & Mfg Co.*, 17 S. C. (N. S.) 339.

The case of *Parrott* v. *Colby* was upon stock liability. The statute of limitations on this liability was one year.

The company's indebtedness was due March 8, 1867. A part was paid August 4, 1868, and a note dated back to January 1, 1868, was given for the balance ($10,000), payable in twelve months. This note not being paid, judgment was recovered upon it against the company 22d July, 1869, and an action was brought to charge the stockholder with the amount of the judgment. The court say: "The real question in the case is, which was the indebted-" ness of the company to which the liability of the respondent "as stockholder attached; the note or the debt for part of " which the note was given. It is very clear that had the orig-" inal indebtedness remained in the form in which it stood " at the time the note was given, to wit, August 4, 1868, no " action could have been maintained against a stockholder " of the company to recover the whole or any portion of it, " because of the lapse of more than one year from the time " when the debt fell due. * * had completely discharged " the stockholders of the company from personal liability. " We think the liability of stockholders in such cases can " not be *revived or extended* by any renewal or extension of " the indebtedness which the creditor may make with the " corporation."

Speaking of the argument of the claimant that by suing the note and putting it in judgment he had elected to treat that as the debt owing by the corporation, the court say, " But these are acts of the appellant himself, to which the " respondent in this case can not justly be said to have as-" sented, and they can not, we think, deprive him of the " right to say the taking of the note was a mere extension " of the original indebtedness and not a payment of it. If " the argument of the appellant's counsel be sound, it would " not be in the power of a stockholder to protect himself

"against the acts of the corporation and its creditors, how-
"ever long time had expired after the maturity of the debt,
"and after the lapse of his liability thereupon by simply
"changing its form to a note or other obligation, and then
"proceeding to merge such note or obligation in a judg-
"ment."

The case of *Union Bank* v. *Wando M. & M. Co.*, 17 S. C. (N. S.) 339, is similar in its facts and to the same effect. It is also instructive upon the question of Holmes' power to create new obligations, binding upon the shareholders, after the bank went into liquidation.

This position is not inconsistent with the view that a judgment against the corporation is evidence against the shareholders when the proceeding against them is to reach assets of the corporation. The same courts that hold that such a judgment is not even *prima facie* evidence against the shareholders in a suit to enforce stock liability, hold that it is evidence where the suit is to reach assets in their hands.

Hastings v. *Drew*, 76 N. Y. 9.

The creditors have dissipated the assets in their own wrong, and thereby released the shareholders.

There can be no question that when the creditors made their settlements with Holmes they knew that the bank was closed for all business but that of liquidation. The law presumes they knew the legal rights of all the parties concerned; that it was the duty of the officers of the bank to collect and convert the assets in the same way as other liquidating officers—such as a receiver, assignee, etc., or as a partner of a dissolved firm—so as to make an end of the liabilities instead of shifting, renewing and extending them. This is a salutary policy of the law. The creditors had no right to take the bills receivable of the bank except as purchasers without recourse. To allow that they might take them as collateral security or to be applied on their demands, when collected, would be to allow them to arrest the course of liquidation; take the means of liquidating from the

control of the shareholders in defiance of their wishes; and by conspiring with the liquidating officers to create new obligations to postpone settlement indefinitely.

When the bank went into liquidation it possessed about $1,500,000 of assets, most of which were then good (some of the bills receivable were secured by real estate), and it owed about $1,000,000 of debts. Had the regular course of liquidation been pursued, instead of this dissipation of the assets, it is fair to presume the debts would have been fully paid; at least it can not be said with certainty that such would not have been the case. That this course was not pursued is not the fault of the stockholders for they were not consulted, but is due to the voluntary interference and undertaking of the creditors themselves, and whatever risks attached ought to be borne by them.

To show how this business was conducted, let us take one case as a sample—that of *Union National Bank* of *Oshkosh*. It had a balance on deposit of $7,702.03. Holmes offered to turn out bills receivable, giving the Oshkosh bank the choice of the lot of paper. It, however, preferred to take *Ira Holmes'* three notes for the amount due Nov., 1874 and Feb., 1885, indorsed "Manufacturers National Bank, by Ira Holmes, pt." This was done Feb. 17, 1884, and the account on the individual ledger was then balanced. Mr. Holmes at the same time exercising the option he had offered Oshkosh bank, took his pick of the bills receivable of his bank to an amount equal to his notes to the Oshkosh bank.

Holmes says he gave $180,000 of paper in this way, taking $180,000 of the bills receivable of the bank, and that he paid all of his notes but about $40,000.

Take also that of *Scott & Wrigley*. They took a note of Henry E. Pickett for $3,750 which was secured by a mortgage on real estate which they foreclosed, and their claim is for a deficiency, $2,857.06 (R. p. 758). Having taken this paper out of the control of the shareholders and experimented with it, dissipated the security, they come back to claim this balance from the shareholders on the assumption that they are liable on an indorsement which they never

authorized, about which they were never consulted and which was given in the face of their resolution to "close" and "liquidate."

Creditor took the bills receivable in payment.

We insist that the creditors took the bills receivable of the bank in payment of their balances and were not entitled to resort to the original indebtedness, even if they had elected so to do and had amended their claims to conform to this change of basis, which they did not do.

It must be borne in mind, that this case does not raise the vexed question of the effect of taking the note of a debtor in settlement of his own indebtedness. The question here is as to the effect of taking by the creditor, the note of a third person, in settlement of the indebtedness. The same courts that hold that the taking of the note of the debtor is not payment, although it suspends the remedy, maintain that taking the note of a third person for an existing indebtedness operates as an extinguishment of the original consideration.

Waydell v. *Luer*, 3 Denio, 410; and cases there cited.

Even if the note of a third person is taken as a conditional payment the creditor is bound to diligence.

Douglass v. *Reynolds et als.*, 7 Peters, 113.

In the case at bar the court below held that the creditors who took this paper took it not in payment but as collateral. No exception was made, although as to many of them there was no conflict of evidence; the evidence was all to the effect that it was taken in payment.

In the case of the *Grundy County National Bank*, in addition to the testimony of Holmes that "in each case where we settled with a creditor and turned him out bills receivable, it was in full payment of the demand; he gave his check on the bank for the amount, the same as if we were doing a regular business, and the parties should come in and buy so much bills receivable and give me his check on another bank." (R. p. 811.) Mr. Goold, who effected the

settlement, testifies: "The notes and paper taken by me was in payment for the claims of the Grundy County National Bank against the Manufacturers National Bank, and was indorsed by the cashier or president of said bank." (R. p. 940.) He further says, "some of the paper was secured by real estate." There is no testimony to the contrary.

This is representative of a class of cases, and by it the views of the court upon the question as one of law and fact may be tested. The court disregarded the testimony altogether, and held as a conclusion of law that the taking of this paper was not a payment, no matter what the parties agreed.

There are a number of cases where the claimants assert that the paper was taken in payment, and to them it is plain to see that the witnesses are testifying to their erroneous conclusions of law. They reason somewhat in this way, Although we took this paper and money and gave our checks to balance our accounts, inasmuch as we received the indorsement or guaranty of the bank, we thereby obtained a recourse upon it in case the makers did not pay: and the effect of the transaction is not payment, but additional security. We submit that this is exactly the opposite of what the law concludes. And such appears to have been the view of the creditors themselves; for in every instance they made their claims, not on the original indebtedness but upon the indorsements or guaranties, until they were informed by the argument of counsel and the holding of the court that they must go back to the original indebtedness as a basis of recovery. They have never amended their claims.

It does not follow that because the creditor labored under a mistake as to the legal capacity of Holmes to bind the stockholders by his indorsement and guaranty, that they may consider the whole transaction as void and go back to the original consideration, for this was not the fault of the shareholders; nor can the shareholders be restored to the advantageous position which they would have occupied as to

their securities had not the creditors taken them out of their power. Neither does it follow from the fact that they were taken in payment that the indorsements and guaranties are "contracts, debts or engagements" of the association, for which the shareholders are bound. It was clearly within the power of Holmes as president and liquidating officer to turn out these bills to the creditors in payment of their demands, and in doing so he vested in the takers a valid title to them, which has never been called in question. Whether these indorsements and guaranties are binding upon the association and its assets, does not concern the shareholders in this contest. They are not binding upon the shareholders. The creditors cited on their own view of the case.

Where a company had sold its effects and good will to another company, and ceased to carry on the business for which it was created, it was held that these facts deprived the president and secretary of the company of all power to create new obligations as between the stockholders and all persons having notice of the fact. It was also held in the same case that notes given by the president and secretary to raise money to pay the debts of the company, were not binding upon the shareholders, and this though judgment had been recovered on the notes against the company.

Union Bank v. *Wando M. & M. Co.*, 17 S. C. (N. S.) 339.

Bonaffe v. *Fowler*, 7 Paige, 576.

Shareholders released by extension of time of payment.

In every instance where paper was taken time was given, running all the way from three months to three years.

We have already shown that this statutory liability is a guaranty or security to the creditors and within their control, and not that of the corporation. It therefore follows, that any act of the creditor that *may* injure the surety, such as an extension of time of payment, will release the shareholder.

This is the doctrine held in the following cases. They are all cases brought to enforce stock liability.

Hanson v. *Dunkersley*, 37 Mich. 184.
Powell v. *Eldred*, 39 Mich. 552.
Moss v. *McCullough*, 5 Hill, 131.
Dunchy v. *Brown*, 24 Vt. 197.
Bassher & Co. v. *Forbes*, 36 Md. 154 (at 166).
Sullivan v. *Sullivan Mfg. Co.*, 20 S. C. 79.
Brown v. *Eastern Slate Co.*, 134 Mass. 590.

In *Hanson* v. *Dunkersley* the extension of the time of payment of the debt of the corporation was held to discharge the stockholder. Justice Campbell says: "The corporation "is in law a different person from any of its members. . A "promise by a stockholder to pay a corporation debt is in "every sense a promise to pay the debt of another. The "case can not be different merely because the obligation is "statutory. It may be that the statute could be so framed "as to create a joint, or a joint and several, responsibility "which could be legislated into a primary obligation; but "when the corporation is put into such relations and the "stockholder can not be called on until the remedy against "the corporation has been tried and exhausted, it is entirely "plain that they are not both original debtors and that one "is only collaterally liable and is therefore in law a mere "*surety*."

And Judge Graves adds: "I can not avoid the impres-"sion that the constitutional and statutory provisions in "question necessarily result in giving to the liability im-"posed specially on stockholders a mere accessory or collat-"eral relation to corporate liability. All admit that this "liability is only imposed on stockholders where there ex-"ists a real corporate liability, and no one believes that "these two are joint. If it be said that the liability of the "corporation and that of the stockholders arise, after all, "simultaneously, the reply is that that circumstance is un-"important in the present consideration. The question is "not whether one liability is earlier or later than the oth-"er, but it is whether in truth one is accessory and collater-"al to the other." The language of the Michigan statute does not materially differ from that under which this case is brought. That is, "The stockholders of every company "* * *. shall be jointly and severally liable in their in-"dividual capacity for all labor performed for such com-

"pany, and shall also be liable for all debts of such com-
"pany," etc.

Whether the liability of a shareholder is primarily or secondarily, is not decisive of the question as to the effect of an extension, for when one signs a bond as surety his liability is said to be primary, but an extension to the principal releases him.

Lang v. *Pike*, 27 Ohio St. 498.
Miller v. *Stewart*, 9 Wheaton, 680.
Ludlow v. *Simond*, 2 Caines' Cases, 1.
Pickersgill v. *Lafens*, 15 Wal. 140.

Statute of Limitations.

Irons brought his original bill Feb. 3, 1875. Joseph Sugart filed an intervening petition Feb. 12, 1875; Scott and Wrigley, March 17, 1875; First National Bank of Hastings, Sept. 2, 1878. These are the only creditors that came forward with their claims in any way within five years from the time the bank closed. A considerable number did not come forward in any way until the expiration of more than five years after the passage of the amendatory act of June 30, 1876.

Whether we consider the amended bill as it stood up to July 23, 1883, as one by Irons on his own behalf alone or as on behalf of himself and all other creditors the statute of limitations continued to run against the other creditors until they came forward in some way to assert their claims.

It is not true that when one files a bill on behalf of himself and all others similarly situated, he thereby makes the others co-complainants with him, or brings them before the court.

Owens v. *Dickenson*, 1 Cr. & Ph. 48 (at. 56).

After decree, they are sometimes termed *quasi* parties.

1 Daniell's Ch. P. & P. 635; 2 Ibd. 1212.

But until decree, the complainant may dismiss his bill.

1 Daniell's Ch. P. & P. 235–6.

And the other creditors may bring separate suits.

Rogers v. *King*, 8 Paige, 209.

Innes v. *Lansing*, 7 Paige, 583.

In very many cases a creditor may file a bill in his own behalf only, and by so doing obtain an advantage over other more tardy creditors. In others he is not permitted to avail himself of this advantage, but must frame his bill so as to distinctly recognize the rights of others to share in the fund which he brings under the control of the court. That is to say, as to them, he must "leave the latch-string out." He can not compel them to come in, nor will the adjudication in his suit bind them unless they do: except as to the fund in the power of the court. This it acts upon because it is within its power, not because all who might participate are before the court.

The language of some text writers would lead us to suppose that this form of bill did in some way bring in the other creditors, but such a supposition is contrary to the logic of the established practice in such cases. They have no control of the suit—are free to bring separate suits. No judgment for costs can be given against them unless they actually come in and submit themselves to the jurisdiction of the court, and unless the complainant shows his right to recover, the bill will be dismissed.

The creditors plant themselves upon the case of *Sterndale* v. *Hankinson*, 1 Sim. 393, but it must be borne in mind that in that case the Vice-Chancellor puts his decision upon the ground that the Statute of Limitations does not bar a suit in equity; that when a court of equity applies the statutory term to stale claims it does so by analogy only. A doctrine which has long since been overturned, except as to causes of purely equitable cognizance.

So we find, in a bill by a specialty creditor filed on behalf of himself and all other specialty creditors, the statute of 3 and 4 Will. IV, c. 27, which bars an action on a specialty in twenty years, was held to apply, and the filing of the bill on behalf of all specialty creditors was held not to arrest the

running of the statute as to those who did not come in within the time limited.

Berrington et als. v. *Evans*, 1 Young & Collyer, 434.

In the case last cited, Lord Abinger resists the argument of the Vice-Chancellor in *Sterndale* v. *Hankinson*, that a bill filed by one creditor on behalf of himself and all others, is a bill filed by all so as to keep alive the claims of all. He regards the coming in of the claimant to share in the fund still in court as the commencement of "a proceeding in "equity to recover money upon a judgment, upon which "twenty years had run" and was barred.

The case of *Sterndale* v. *Hankinson* is again sharply criticised in *In re Greaves, Dec., Bray* v. *Tofield*, 50 Ch. D. 551 (1881). The claim under consideration in that case was upon a note, and was brought in more than six years after it was due. Jessel, M. R., says: "It is a claim which can only be enforced by action" * * * "and is within the very words of the statute of James." He warns creditors, "*that they "better not rely upon the decision in Sterndale* v. *Hankinson "for the future*," and after reviewing it and showing that the reasoning no longer applies, concludes: "It seems to me that the safest and plainest rule is to say, that this being, as it is, a mere action for a debt, it is within the very words of the statute, and the claim is barred."

The action at law to enforce this liability before the act of 1876, was a special action on the case upon promises.

Carroll v. *Green*, 92 U. S. 510.

Inasmuch, therefore, as this liability might have been enforced by an action at law, in which the statute would have been imperative, so, in equity, it is imperative, and no discretion is left to the court of equity to dispense with it.

Therefore the current of authorities in this country is that the statute will be applied and continue to run, in suits in equity to enforce such liability, as well where the bill is on behalf of all creditors similarly situated, or where the bill is filed in the complainant's behalf alone.

Abrahams v. *Meyers*, 40 Md. 499.

Hall's Adm'r v. *Cresswell*, 12 G. & J. (Md.) 36.
McDowell v. *Goldsmith*, 24 Md. 215.
Ohio L. & T. Co. v. *Wenn & Ross*, 4 Md. Ch. 26.

In *Abrahams* v. *Meyers*, the court use the following language: "In a suit instituted for the benefit of creditors gen-"erally or where, as in this case, creditors are called in by "authority to receive distribution from a fund under the "control of the court; the day of filing the petition to be "admitted as a creditor or the day of filing the voucher or "evidence of the claim is considered as the commencement "of the suit as to such creditor, and from that day the "statute ceases to run against the claim. From that day "the claimant becomes a party to the proceedings, and is "entitled to participate in their further prosecution. But "to entitle him to this *status* he must come into court in the "proper case as a party claimant, and be ready to assume "the burden of establishing his claim as against any oppon-"ent who may lawfully resist it."

The Statute of Limitations of Illinois, under which this liability comes, reads as follows:

"Actions on the written contracts, express or implied, or "on awards of arbitration or to recover damages for an "injury to property, real or personal, or to recover the pos-"session of personal property or damages for the detention "or conversion thereof, and all civil actions not otherwise "provided for shall be commenced within five years next "after the cause of action accrued."

The Statutes of Limitation are now regarded more favorably than formerly—are considered as resting in sound policy, and are not to be evaded.

Wood v. *Carpenter*, 101 U. S. 135.
Clementson v. *Williams*, 8 Cranch. 72.
Bell v. *Morrison*, 1 Pet. 351, 360.
McClung v. *Silliman*, 3 Pet. 270.
Hawkins v. *Barney*, 5 Pet. 457.
Roberts v. *Pillow*, Hempst. 624; aff'd, 13 Howard, 472.

In *Wood* v. *Carpenter*, 101 U. S. 135; Justice Swayne uses the following language: "Statutes of Limitation are vital "to the welfare of society, and are favored in the law. "They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving "security and stability to human affairs. An important "public policy lies at their foundation. They stimulate to "activity, and punish negligence. While time is constantly "destroying the evidence of rights, they supply its place by "a presumption which renders proof unnecessary. Mere "delay extended to the limit prescribed is itself a conclusive "bar. The bane and antidote go together."

In that class of cases in which courts of equity exercise concurrent jurisdiction, they consider themselves bound by the Statutes of Limitation which govern like demands sued in courts of law, and apply them in obedience to them as statutes rather than by way of analogy.

Wagner v. *Baird*, 7 How. 234.
Bank of U. S. v. *Daniel*, 12 Pet. 32.
Godden v. *Kimmel*, 99 U. S. 201.

So that even if the bill in this case had been originally in behalf of all creditors of the bank, only such claimants should have been allowed by the master to prove their claims, as had, by petition or in some way, brought forward their claims within five years after the cause of action accrued to them respectively, which was Sept. 26, 1873, the time the bank closed its doors and went into voluntary liquidation.

But such was not the scope of the bill until July 23, 1883, when, by leave of the court, it was amended by the insertion of an averment that it was brought "in behalf of the complainant and all other creditors of the bank," and by making other appropriate changes in the frame and prayer of the bill.

The object of the original bill in this case was to reach the assets of the defendant bank, and the stockholders were not made defendants to that bill. It did not purport to be on behalf of the complainant and other creditors, on the

contrary, it sought the payment in full of the complainant's judgment, and the usual advantages which courts of equity accord to the vigilant, and therefore prays that "so much of the assets of the bank as may be necessary for that purpose be applied to the *payment of complainant's judgment in full both principal and interest*," and that the bank be prohibited from making any sales or transfers of its property, and from doing *any act to enable other creditors to obtain any of the property and effects*, and for the appointment of a receiver.

The complainant from time to time, received substantial relief, in pursuance of the prayer of his original bill.

A few other creditors were permitted by the court to come in under that bill, and they no doubt obtained the standing usual in such cases.

It is assumed by the counsel for complainant that the first amendment bill conformed the case to the second section of the statute of June 30, 1876, which authorizes the enforcement of the individual liability of shareholders by bill in equity, "*in the nature of a creditor's bill, brought by a creditor on behalf of himself and all other creditors of the association against the shareholders.*"

We think no one can read that amendment without being impressed that the pleader intended if possible to steer clear of that act. It not only does not contain any allegation that it is filed on behalf of himself and all other creditors of the association, but on the contrary antagonizes all other creditors the same as the original bill and prays for *payment of the complainant's demand in full*.

The only material differences between the original bill and as thus amended, are that the amendment adds these stockholders as defendants and seeks to swell the fund by the amount of their liability, and prays that the money and property in the hands of certain of the defendants and that which shall be realized on the stock liability of others shall be paid into court or to the receiver appointed by the court, "*and that out of the fund so created, your orator's judgment be paid in full*, and the balance thereof be distributed among

the creditors of said bank, in such way and manner as your Honors shall direct." It also prays that "your orator's said judgment be decreed to be a *first lien* upon all the moneys, property and effects of the said bank discovered by this proceeding."

It is true, the bill asks "that an account be taken of all the present indebtedness of said bank, so far as the same can be ascertained," which would be a proper prayer, in either aspect of the case; but it also prays, "that an account be taken of the amount due your orator and the other judgment creditors of said defendant bank, who have been made parties to this proceeding by interpleader or otherwise," which shows the pleader was pursuing the same road upon which he had started out in his original bill.

All this is in entire harmony with the principal prayer of the bill that he first paid and the balance be distributed among the other creditors of the bank as the court shall direct; meaning such as had obtained rights by interpleader. These indefinite prayers were to cover the cases of intervening creditors and their indefiniteness is attributable to the unskillfulness of the pleader and not to the desire to favor the general creditors of whom he was praying advantage, even in the event that they should intervene. They have not understood the bill as being in their behalf, indeed they had no right to assume it to have been so brought, inasmuch as it did not profess to be so. There is, therefore, no room for them to contend as was done in *Sternsdale* v. *Hankinson*, that they were misled by the form of the bill into supposing their rights were being taken care of. As the bill stands to-day, it is not in strict conformity to the statute. There is no warrant in the statute for uniting as defendants the bank and other parties with the shareholders. The act says who the parties shall be: "A creditor on behalf of himself and all other creditors of the association," shall be complainant, and "*the shareholders of the association*" are to be the defendants. What is more or less than this is outside the warrant of the statute.

"Although one legatee may file a bill in favor of himself

"and all others who might choose to come in under the de-
"cree, *yet the bill must state the fact that it is filed in behalf of*
"*the complainant and all others, etc.*"

Fish v. *Howland et al.*, 1 Paige, 20.

"In all cases where one, or a few individuals of a large
"number institute a suit on behalf of themselves and the
"others, *they must so describe themselves in the bill*, otherwise
"a demurrer or plea for want of parties will lie."

1 Daniel's Ch. P. & P. 245.
Egberts v. *Wood*, 2 Paige, 517.
Baldwin v. *Lawrence*, 2 Simons & Stewart, 18.
Leigh v. *Thomas*, 2 Ves. Sen. 311.
Moore et al. v. *Reynolds*, 109 Mass. 473.
Harper v. *Union Mf'g Co.*, 100 Ill. 225.

In the last two cases cited (which were for the enforcement of stock liability) the bills were dismissed because they were not so framed. The counsel for the complainants did not, as in the case at bar, have the hardihood to say they were in behalf of all creditors because the law required that they should be so.

Parties will not be bound by an account of the assets taken under a decree made in a suit instituted by a single creditor not in behalf of himself and others.

2 Daniel's Ch. P. & P. 1207.

The only claimants who were before the court, in any way within the five years are Irons, Schugart, Scott and Wright, and the First National Bank of Hastings, Minnesota.

It is not now contended that the amendment of July 23, 1883, was not a proper one to be made in behalf of the complainant. It may have been necessary to enable him to recover in equity at all. It is not denied but that the liability given by the statute was enforcible at law.

Perry et al. v. *Turner*, 55 Mo. 418.
Unsted v. *Buskerk*, 17 Ohio St. 113.
Carroll v. *Greene*, 92 U. S. 509.

But what we do contend is that it should not have the effect to let in claims that, except for the amendment, could

not have been brought in. This covers all claims except those just mentioned.

"Where a new cause of action or new matter or claim is "brought into the case by amendment of the bill or declara- "tion, the amendment does not take effect by relation from "the time of filing the bill or declaration so as to prevent "the operation of the statute, but the statute continues to run "in respect to such new cause or claim to the time of the "amendment."

Phelps v. *I. C. R. R. Co.*, 94 Ill. 548.
Allen v. *Link*, 5 Lea (Tenn.) 454.
King v. *Avery*, 37 Ala. 169.
Dudley v. *Price*, B. Monroe, 84.
Holmes v. *Trout*, 1 McLean, 1.
Christmas v. *Mitchell*, 3 Ired. (N. C.) Ch. 235.

When in the amended bill a distinct right was set up (though to the same land) it was held that, it could not be considered in a more favorable point of view as to the statute of limitations, than the assertion of the same right in a bill filed at the time the amendment was made. (Point not stated in the head notes to the case.)

Holmes v. *Trout*, 7 Peters, 171 (at page 181).

If a party amends his declaration in ejectment by inserting a new count, laying a demise from a different lessor, the statute of limitations, against this new title continues to run until the amendment is made.

Sicard v. *Davis*, 9 Peters, 124.

Where the complainant makes new parties by amendment of his bill, the suit can not be said to be commenced against them until the amendment is made, and the statute of limitations will avail the new defendants, at the period when the amended bill is filed, and they are not to be affected by the proceedings during the time they were strangers to it.

Miller v. *McIntyre*, 6 Peters, 61.
Campbell v. *Browne*, 5 Paige, 34.

In *Busby* v. *Seymour*, 1 Jones & Tourche 527, a bill was

filed by a creditor against an executor, who was also heir at law of the decedent, to reach the personal estate. It appeared from the master's report that the personal estate had been exhausted in paying judgments. A supplemental bill was then filed by complainant in behalf of himself and all other creditors, praying to have the benefits of the former suit, and that complainant and all other simple contract creditors might be subrogated to the place of judgment creditors whose debts were paid out of the personalty and for relief against the real estate of the decedent. The original bill prayed relief against the real estate but was not filed in behalf of all the creditors. The supplemental bill, so far as it sought relief against real estate, was dismissed. Sugden, L. C., at page 533, says: "In May, 1834, it appeared "that there was a deficiency in the personal assets of the "executor, to answer the demands upon them. Nevertheless, the party proceeded in the cause without altering the nature of his suit, *on the notion that by force of his suit he had obtained a priority over the other creditors of the executor*, and upon that view of the law he chose his remedy, such as he was entitled to, and then found he was mistaken in point of law, and by a new bill filed in 1844, the present plaintiff, who stands in place of the former plaintiff, asks for the first time for a decree to marshal the assets, * * * but the court can not permit this to be done.

When did the Statute begin to run?

The decree finds that the bank went into voluntary liquidation Sept. 26, 1873. At this time, then, the cause of action accrued, and suit might have been brought by any or all the creditors whose demands were due; they were then in the shape of credit balances on deposit.

Terry v. *Tubman*, 92 U. S. 156.
Baker v. *Alton Bank*, 9 Metc. 182–197.
Carroll v. *Green*, 92 U. S. 510.
Godfrey v. *Terry*, 97 U. S. 171.

The court say, in the case last cited:

"We are of the opinion that it is not necessary first to ex-

"haust the assets of the bank by legal proceedings. The "case is not so much like that of the guaranty of the 'col- "lection' of a debt where the previous proceeding against "the principal debtor is implied, as it is like a guaranty of "'payment,' when resort may be had at once to the guaran- "tor without a previous proceeding against the principal.'

Insolvency or inability to pay, the court further say, may be shown by continued suspension of business or other notorious indications.

The new matter set up in the amended bill is distinct, and different from the subject-matter of the original bill, requiring a distinct and different decree, and is therefore not such as can be brought in by amendment or supplemental bill.

The original bill was to discover and subject the assets of the bank to the payment of the complainant's judgment, and to give the complainant a first lien upon such assets.

The amended bill seeks to mass the shareholder's liability with the assets of the bank, and thereby form a common fund.

If we are right in the position that this liability is not an asset of the bank, but a security to the creditors, it follows, that this amendment was inconsistent with the original bill rendered the bill multifarious.

It introduces new parties, a new subject-matter and requires different relief.

"A bill may be originally framed with a double aspect, "or may be so amended as to be of that character. But the "alternative case stated must be the foundation for precise- "ly the same relief; and it would produce inextricable con- "fusion if the plaintiff were allowed to do what was at- "tempted here.

Story's Eq. Pl. 42, 43. Mitford's Eq. Pl. 88;

Edwards v. *Edwards*, Jacob, 335.

"Nor is a complainant at liberty to abandon the entire "case made in his bill, and make a new and different case, "by way of amendment. We apprehend that the true rule "on this subject is laid down by the Vice Chancellor in "*Verplanck* v. *The Mercantile Ins. Co.*, 1 Edward's Ch. R. 46. "Under the privilege of amending, a party is not to be per-

"mitted to make a new bill. Amendments can only be al-
"lowed when the bill is found defective in proper parties,
"in the prayer for relief, or in the omission or mistake of
"some fact or circumstance connected with the substance of
"the case, but not forming the substance itself, or for put-
"ting in issue new matter to meet new allegations in the an-
"swer. See authorities there referred to, Story's Eq. Pl. 884.
"We think sound reasons can be given for not allowing the
"rules for the practice of the Circuit Court, respecting
"amendments, to be extended beyond this; though doubt-
"less much liberty should be shown in acting within it;
"taking care always to protect the rights of the opposite
"party. See *Mayor* v. *Dey*, 3 Sim. & Stu. 113. To strike
"out the entire substance and prayer of a bill and insert a
"new case by way of amendment, leaves the record un-
"necessarily encumbered with the original proceedings, in-
"creases expenses, and complicates the suit; it is far better
"to require the complainant to begin anew. To insert a
"wholly different case is not properly an amendment, and
"should not be considered within the rules on the subject."

Shields v. *Barrow*, 17 How. 409–415.

Smith v. *Woolfolk*, 115 U. S. 143.

"And first, as to amendments by the plaintiff. Amend-
"ing the bill may be useful for various purposes, for the
"correction of mistakes, or for the suppression of impolitic
"admissions in the original statements; or for adding new
"parties; or for inquiring into additional facts, or for the
"further investigation of facts, which have been only par-
"tially disclosed; or for putting in issue new matter stated
"in the answer. The amendment proposed must be merely
"in addition to the original bill and not inconsistent with
"it.

Rogers v. *Rogers*, 1 Paige's Chancery, R. 424.

"A party under the privilege of amending, is not to
"introduce matter which would constitute a new bill."

"Amendments can only be granted when the bill is de-
"fective in parties or in prayer for relief, or in the omis-
"sion or mistake of a fact or circumstance connected with
"the substance, but not forming the substance itself, nor
"repugnant thereto. The latter part of this principle ap-
"applies to all pleadings in equity."

1 Ed. Chcy. Rpt. 46.

Lyon v. *Tallmadge*, 1 John. C. R. 184.

"The court will not suffer the amendment to be made by "striking out any portion of the pleading."

Verblank v. *M. I. Co.*, 1 Edwards, Ch. Rep. 46.

To the same effect, are the following authorities:

Crabb's Administrators v. *Thomas*, 25 Ala. 212.
Lambert v. *Jones*, 2 P. & H. Rep. 144.
Carey v. *Smith*, 11 Geo. 539.
Fenno v. *Coulter*, 14 Ark. 45.
Williams v. *Starke*, 2 B. Monroe, 196.
Pratt v. *Squire*, 5 Cush. 551.
Ryan v. *Talmage*, 1 John. Ch. 184.
Belknap v. *Stone*, 1 Allen, 572.

"A bill filed by the assignees of an insolvent debtor "prayed the aid and direction of the court, in relation to "conflicting claims of creditors, and the order in which "they should be paid, and also prayed for relief against the "debtors of the assignor and sought to enforce payment "from them. Held, that as the two branches of the bill "were founded on distinct rights, they were misjoined in "one suit."

Dunnock v. *Bixby*, 20 Pick. 368 (1838).

"A claim against the directors of a manufacturing com- "pany, under Rev. St., C. 38, on the ground that its debts "exceed its capital stock, can not be joined in one bill in "equity with a claim against its stockholders under the "same chapter, on the ground that the capital stock was not "duly paid in and certified."

Cambridge Water Works v. *Somerville Dyeing and Bleaching Co.*, 14 Gray, 193 (1859).

"A claim against the officers of a corporation under St. "1862, C. 218, on the ground that they did not file the cer- "tificate required by St. 1862, C. 210, and also upon the "ground that they signed the certificate required by Gen. "St. C. 61, § 8, knowing it to be false, can not be joined in "one bill in equity, with a claim against the stockholders "upon the ground that the capital stock was never fully "paid in."

Pope v. *Leonard*, 115 Mass. 286 (1874).

By multifariousness "is meant the improper joining in "one bill distinct and independent matters, and thereby

"confounding them. As for example, the uniting in one "bill of matters perfectly distinct and unconnected against "one defendant, or the demand of several matters of a dis- "tinct and independent nature against several defendants in "the same bill: Story, Eq. Pl. 271. In Daniell's Ch. Pr. "335, it is said in explanation of this, that it may be that the "plaintiffs and defendants are parties to the whole transac- "tion which form the subject of the said deed, nevertheless "those transactions may be so dissimilar that, the court will "not allow them to be joined together, but will require dis- "tinct records."

Walker v. *Powers*, 104 U. S. Rep. 245.

If the right to maintain an action against the defendant shareholders was given by the act of June 30, 1876, and could have been the subject of a distinct action in which the bank and the other defendants are not necessary parties, then it is not the subject of an amendment or supplemental bill, but of an original bill.

"There is no authority that goes so far as to authorize a "party who has no cause of action at the time of filing his "original bill, to file a supplemental bill in order to main- "tain his suit upon a cause of action that accrued after the "original bill was filed; even though it arose out of the "same transaction that was the subject of the original bill."

Pinch v. *Anthony*, 10 Allen, 477.
Milner v. *Milner*, 2 Edw. Ch. 114.
Pilkinton v. *Wignall*, 2 Mad. 240, 244.
Prichard v. *Draper*, 1 R. & M. 191.

Matter accruing since the bill was filed and which constitutes the basis of a new proceeding, can not be incorporated into the original bill by amendment. The proper course for complainant to pursue is to bring a new suit. It is only when a suit shall become defective from an event happening after the filing of the bill, that a supplemental bill can be filed under No. 57 of Supreme Court rules.

Mason, Admrs. v. *R. R. Co.*, 10 Fed. Rep. 334.

Charles Comstock's Case.

The amended bill charges that while the bank was contemplating insolvency and was in fact insolvent, and after

the suspension of payment, Mr. Comstock and other stockholders, combining with Ira Holmes, surrended to Holmes their stock for the purpose of defrauding the complainant and other creditors of the bank; that Comstock so surrendered 100 shares of his stock. Answers were called for under oath.

Mr. Comstock in his sworn answer says he sold 50 shares to Ira Holmes in February, 1873, and 50 shares to P. C. Maynard in June, 1873. That at these times the bank was in good credit; that he knew of no trouble, and repels every intimation of fraudulent intention. He says he sold the other 50 shares to Holmes, September 23, 1873. Mr. Holmes supports Mr. Comstock's answer as well as to the times as also the good faith of these sales. He says he bought the first 50 shares when Buchanan came in as Vice President of the bank in February, 1873.

The stock books introduced on the part of the complainants show that 50 shares were transferred Sept. 23, 1873, and 50 more on 24th, and that 50 more were canceled on the last date. Mr. Holmes says as to the last 50 shares, they must have been transferred at the same time, as no stock was canceled unless a new certificate was at the same time issued for the same shares to some one else. He also shows he bought the stock in good faith and before the bank was in trouble. (R. pp. 824–5.)

The complainants introduced no evidence whatever in support of their allegations of fraudulent intention on the part of Mr. Comstock in making sale of the stock or procuring its transfer on the books of the bank.

We concede that if the transfer upon the books had not been made until after the suspension of the bank, Mr. Comstock would have remained liable for the "contracts, debts and engagements" of the bank then subsisting, regardless of the good faith in the sale. But we contend that if he in good faith sold his stock as he did, months before, and it was transferred on the books before the suspension actually took place, he was not so liable; three or two days were as good as a hundred. The time of the transfer

cance except as it bears on the question of
l here there was no pretense in the evidence
were not actually made in good faith and
was perfectly sound.

f a transfer of stock in an incorporated com-
plete *novation* of rights and obligations, except
on of this principle is restrained by equity to
upon creditors. When the transfer is made
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v. *Johnson*, 107 U. S. 251 (at 261).

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"to divide, from fifty to seventy-five cents on the dollar." (R. p. 825.) It is fair to conclude from the course taken by the creditors up to the time Irons filed his bill that they also believed the bank would "pay out," and such undoubtedly would have been the case, except for the fact that values went down in 1874 and 1875 so as to break up some of the heaviest debtors of the bank whose paper was freely discounted at the banks at the time of the suspension. (R. p. 823.)

The error in finding the 23d of Sept., 1873, as the time the bank suspended, has misled the court not only in regard to Mr. Comstock's liability, but as we have before shown in fixing the date at which the master should find the indebtedness of the bank, and from which interest should be charged.

While we freely admit the well-established doctrine that the stock register is conclusive in favor of creditors, we at the same time invoke the benefit of the same doctrine as against them.

If equity can not soften the rigor of this doctrine in favor of the one, it certainly will not do it in favor of the other.

To apply this proposition to the case at bar, let us take the claim of *Charles Goldsberg*, which originated Sept. 15, 1874 (R. p. 769), nearly a year after Mr. Comstock's stock was transferred on the books (and this is only one of a number of like cases), or take another representative case, that of the *Grundy County National Bank*, that took bills receivable "*in payment*" of its claim against the bank (R. p. 940), and whose claim is based upon a contract of indorsement, made Jan'y 2, 1874. If the court will look at the evidence (R. pp. 745 and 840), it will see that this bank kept up a running account with the debtor bank until Jan'y 9, 1874, by which the balance was several times changed.

The stock register showed that Mr. Comstock's stock had been transferred to Mr. Holmes on the 23d and 24th Sept., 1873, and those dealing with the bank after that time must be held to have done so on the understanding that Holmes and not Comstock was the owner of it.

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has no significance except as it bears on the question of good faith, and here there was no pretense in the evidence that the sales were not actually made in good faith and when the bank was perfectly sound.

The effect of a transfer of stock in an incorporated company is a complete *novation* of rights and obligations, except as the operation of this principle is restrained by equity to prevent fraud upon creditors. When the transfer is made while the corporation is pursuing its regular business, the fraud must be affirmatively shown; if after suspension the court may presume it, as to the then creditors.

R.S. Sec 5139

Carroll v. *Greene*, 92 U. S. 509.

National Bank v. *Case*, 99 U. S. 628 (at 631).

Bowden v. *Johnson*, 107 U. S. 251 (at 261).

Whitney et al. v. Butler (Oct. Term 1886)

Speaking of the liability of a stockholder, Mr. Justice Blatchford says: "This liability attached to him until, without fraud as against creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do this by a *bona fide* transfer of his stock," etc.

The decree finds that the bank went into liquidation Sept. 26, 1873, and this is according to the evidence.

It also finds that it suspended Sept. 23, 1873. This finding is without a word of proof tending to support it. The proof that it did not suspend until it went into liquidation, as we have before shown, is overwhelming. We refer to the testimony of Holmes that the bank "continued to carry on its "business in regular course right up to the time it went "into liquidation—up to and including the twenty-fifth; that "it did not suspend until after the vote to go into liquida-"tion" (R. p. 810), and to the large amount of business which the accounts offered in evidence by the complainant shows, were done on the 23d, 24th and 25th; extending into the hundreds of thousands of dollars received and paid out.

The bank went into liquidation in the full belief, on the part of its shareholders and officers, that "after the creditors "should all be paid, there would be left for the shareholders

"to divide, from fifty to seventy-five cents on the dollar." (R. p. 825.) It is fair to conclude from the course taken by the creditors up to the time Irons filed his bill that they also believed the bank would "pay out," and such undoubtedly would have been the case, except for the fact that values went down in 1874 and 1875 so as to break up some of the heaviest debtors of the bank whose paper was freely discounted at the banks at the time of the suspension. (R. p. 823.)

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tention that all who took the bills receivable of the bank, or the notes of Holmes (allowing him at the same time to take an equal amount of the bills receivable of the bank) thereby giving time and dissipating the assets, should be held to have released the shareholders' liability.

Case of W. Henri Adams, Admr.

William H. Adams was the holder, at the time the bank went into liquidation, of 240 shares. These he assigned to Jonas Hutchinson, Oct. 27, 1873 (R. p. 1173). Mr. Adams died June 6, 1882 (R. p. 675), over a year before the interlocutory decree (R. p. 652). Did the statutory liability survive against his administrator, and if so, for what obligation is he liable?

We concede that this statutory liability is one of implied contract, but we submit that this is not decisive of the question of survivorship. There are many contract obligations that do not survive; such as are of a personal nature; as to paint a picture; to build a light house, *Robinson* v. *Davisson*, L. R. 6, Ex. 269, 274; by master to instruct apprentice, *Baxter* v. *Burfield*, Bott. P. L. Pl. 696, 6th Ed.; not to exercise a business, but to procure to another his customers, *Cook* v. *Colcraft*, 2 W. Bl. 856; to furnish all lumber sawed at defendant's mill for five years, *Dickinson* v. *Callahan*, 19 Penn. St. 227.

On a convenant *in law* no action lies against an administrator for covenant broken after death of the covenantor, *Swan* v. *Straushaw*, Dyer, 257. The same with an implied covenant, *Williams* v. *Burrill*, 1 C. B. 402

The question rests wholly upon the construction of the statute. Many of the State statutes expressly extend the liability to the personal representatives.

Dane v. *Dane M'f'g Co.*, 14 Gray, 488, was a suit to enforce a stockholder's liability. The stockholder having died pending the suit, a motion was made to revive it against his executor. The court held that: "the individual liability of stockholders for the debts of a corporation is one depending solely upon the provisions of positive law. It is to be

construed strictly and not extended beyond the limits to which it is plainly carried by such provisions of statute," quoting in support, *Gray* v. *Coffin*, 9 Cush. 192. The court held that the action does not survive against the executor.

The case of *Bacon* v. *Pomeroy et al.*, 104 Mass. 577, is still stronger. In order to procure credit at a bank the stockholders signed an agreement that they would hold themselves liable, jointly and severally as co-partners, as long as they were stockholders, to pay the debts of the corporation.

One of the signers paid two loans thus secured, and sued for contribution, the executors of another signer, who died after the first and before the second loan. As to the first loan the court (Gray, J.) held the action barred, and as to the second that the deceased was not a stockholder and neither the statutory liability or that created by the contract survived. The court used this language: "The statute liability of a stockholder for the debts of a manufacturing corporation is limited to debts contracted while he is a stockholder, and, as has been repeatedly held, *in the absence of express provision for its continuance terminates with his death.*" Referring to *Child* v. *Coffin*, 17 Mass., 64; *Ripley* v. *Simpson*, 10 Pick. 371; *Dane* v. *Dane Man'g Co.*, 14 Gray, 488.

In *Ripley* v. *Simpson et al.*, 14 Pick. 371, the administrator had paid money on the assumption that the estate was liable to contribute to pay corporate debts. The court held that the administrator could not be allowed, on final settlement of his accounts, the money thus paid, on the ground that the individual liability of a stockholder, created by the statute, could only be enforced in the manner pointed out by the statute.

In *Bangs* v. *Lincoln*, 10 Gray, 600, it was held that the liability of a stockholder could not be the subject of an allowance, as against the estate of a person in insolvency, under the insolvency laws of Mass. There having been no judgment against the corporation, or the necessary previous steps to fix the same as an absolute debt against the party as an individual stockholder.

In *Chase* v. *Lord et al., exrs.*, 77 N. Y. 1, the doctrine of

strict construction as announced in the cases above alluded to, is indorsed.

The same doctrine is held in the following cases:

Chase v. *Lord et al., exrs.*, 77 N. Y. 1.
Howard v. *Wilcox*, 47 Pa. St. 57.
Burnham v. *Wellensburg Coal Co.*, 47 Pa. St. 49.
Dauchey v. *Brown*, 24 Vt. 197.

In those States where it is held that the liability of stockholders is that of partners, it is quite logical that the courts should hold that the liability survives as in Connecticut.

Deming v. *Bull*, 10 Conn. 409.

We understand that this court is in accord with Massachusetts as to the nature of the liability, and that it is not that of partners, but is of purely statutory creation.

Pollard v. *Bradley*, 20 Wal. 520.
Carrol v. *Greene*, 92 U. S. 509.
American File Co. v. *Garrett*, 110 U. S. 288.

In *American File Co.* v. *Garrett*, the court say:

"It is well settled that under the circumstances of the "case, neither the assignees' nor the assets in their hands, "are subject to the individual liability which attaches to "stock held by the bankrupt. The evidence does not show "that the assignees acted in any way as stockholders." *Gray* v. *Coffin*, 9 Cush. 190. "As the assignees, *never accepted the "stock, and never consented to become stockholders in the Co.*, it "follows that neither they nor the assets of Chapman in "their hands, are subject to the individual liability of "stockholders for the debts of the corporation."

Neither § 5151 nor the amendatory act of June 30, 1876, includes the personal representatives of a stockholder. "The first says the "shareholder shall be held individually responsible," and the last authorizes a bill in the nature of a creditor's bill "against the shareholders." Personal representatives are not included in the expression of the statute. Section 5152 does not apply to Adams' Administrator for the reason that he never became a shareholder.

The shares had been assigned to Hutchinson long before Adams' death. Oct 27, 1873. (R. p. 1173).

We urge in behalf of Adams' estate the same considerations in respect to the dealings of the creditors with the bank as we have above urged in favor of Mr. Comstock, viz.: 1st, that he was not bound by contracts made between the creditors and the bank, after such transfer on the books. 2d., that taking the assets of the bank, whether in payment of in any way so as to arrest the regular cause of liquidation, released him as to such as took them. 3rd, that giving time discharged him, his liability being that of guarantor.

The position of the court below on this point may be stated about as follows: 1st. The closing of the bank fixed the liability of the shareholders. They were to be considered stockholders who appeared so on the books. This we admit. 2d. The creditors might, however, make new contracts with the bank; extend time of payment; go off with the assets in spite of the direction of the shareholders to the contrary; bring them back and revoke their settlement if the experiment did not please them. 3d. That during all this the shareholders are powerless to help themselves; that even the sale and transfer of their stock on the books will be treated as a nullity as to such creditors and their doings.

HARVEY B. HURD,
Solicitor for Appellants.

MELVILLE W. FULLER,
of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

ALONZO RICHMOND, CHARLES COMSTOCK ET AL.,
Appellants,
vs.
AGNES F. IRONS AND ANDREW H. FOSKETT, EXECUTRIX AND EXECUTOR OF JAMES IRONS, DECEASED, ET AL.,
Appellees.

Appeal from Circuit Court, United States, Northern District of Illinois.

BRIEF FOR APPELLANTS

BY

MELVILLE W. FULLER.

BARNARD & GUNTHORP, LAW PRINTERS, 87 & 89 LASALLE ST., CHICAGO.

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MAY IT PLEASE YOUR HONORS:

As a matter of convenience I have given the title to the cause here which it bore in the court below.

The decree adjudged against the defendants severally, the payment of certain sums of money to Joel D. Harvey, receiver in the cause, and accordingly the appeal bonds ran to him, and the case is entitled in this court as if the suit had been *brought* by Harvey, receiver, which was not the case.

The excellent briefs of Messrs. Henry G. Miller and H. B. Hurd, on behalf of appellants, leave little, if anything, further to be said. But I will, on behalf of my immediate clients,

make some suggestions, and, in doing so, briefly restate such of the facts as I deem necessary to be considered in connection with what I have to say.

September 26, 1873, the Manufacturers' National Bank, of Chicago, went into voluntary liquidation.

December 2, 1874, James Irons recovered a judgment against the bank in the Circuit court of the United States for the Northern district of Illinois, for $12,408.50. Execution was issued thereon and returned February 1, 1875, no part satisfied.

February 3, 1875, James Irons filed in the Circuit court of the United States for the Northern district of Illinois, a creditors' bill against the bank and Ira Holmes, who had been the bank's president and was charged with the possession of assets. The appointment of a receiver was applied for and the court held (*Irons* v. *Manufacturers' National Bank*, 6 Biss., 301), that power to make the appointment existed.

February 26, 1875, the following order was entered:

"It is ordered and decreed that Joel D. Harvey, of the city "of Chicago, in this district, be appointed receiver of all the "property, real and personal, claims, rights, credits, assets, "books of account, abstracts of title, deeds and other evi- "dences, and muniments of title, and effects of every descrip- "tion, of said defendant, The Manufacturers' National Bank "of Chicago, with full power and authority to take and receive "possession and control of the same, and the same to collect, "convert, manage and dispose of, subject to the order and "direction of this court," &c. (Printed Rec., 15.)

The bank had gone into liquidation September 26, 1873, and at the time of the appointment of the receiver the total indebtedness of the bank, as shown by its books, was $38,586.24, but the bank had endorsed and guaranteed a large amount of

the paper that had been taken by creditors in liquidation of their several demands.

February 12, 1873, Joseph Shugard, Third National Bank of St. Louis, David O. Smart and Charles Gudgel, were, upon their petition, admitted into the case as intervening judgment creditors. (Pr. Rec., 11–13.)

March 17, 1873, George W. Scott and John Wrigley were, in like manner, admitted as intervening judgment creditors. (Pr. Rec., 16.)

September 2, 1878, the First National Bank of Hastings filed its petition, and was admitted as an intervening judgment creditor. (Pr. Rec., 58.)

February 14, 1879, the intervening petitions of the Third National Bank of St. Louis and of Smart and Gudgel were, on motion of their solicitors, dismissed. (Pr. Rec., 151.)

The claim of James Irons was for $12,415.21; of Joseph Shugard, $407.35; of Scott and Wrigley, $2,851.06; of the First National Bank of Hastings, $13,923, as will be seen by reference to the pages of the printed record hereinbefore referred to, and they aggregated $29,626.62. These are all the claims for the collection of which proceedings were instituted during the five years immediately preceding the date of the suspension of the bank, September 25, 1873, or its going into liquidation, September 26, 1873.

Afterwards, and at various times during the month of December, 1878, and the years 1879, 1880, 1881 and 1882, other creditors of the bank came in, filed their petitions, upon leave, without notice to defendants, or presented their claims before the master, and were allowed to prove their claims against the bank, against the objection of the defendants, made in apt time, and other claims still were presented as late as 1884, and simi-

ilarly allowed. To each of these claims the objection of the bar of the statute of limitations was interposed, and overruled.

Interest upon all these claims, no matter when presented, was calculated and included in the decree from September 23, A. D. 1873, to May 21, 1886.

October 5, 1876, leave was given complainant "to file an "*amended* bill making additional defendants herein." (P. Rec., 25.)

And on the same day the complainant filed the amended bill, which thus commences: "And your orator, having here- "tofore exhibited to your Honors his original bill of complaint "in said cause, presents herewith his *amended* bill and prays "that the same may be allowed, and thereby further shows "unto your Honors." (P. Rec., 25, 26.)

In this amended bill complainant Irons sets up the failure of the bank, its going into liquidation, the settlement of a large amount of its indebtedness, and "that the present existing in- "debtedness of the said bank is forty thousand dollars, or "thereabouts:" gives the names of the persons he believes were stockholders at the time the bank went into liquidation, and charges that they, or some of them, for the purpose of relieving themselves from any personal liability, transferred their stock to Ira Holmes, who purchased the same *with the money and assets of the bank*, and "that the said pretended "purchase and cancellation of the said stock, so made, in the "manner and for the purpose aforesaid, was and is a fraud "upon the rights of your orator and the other creditors of the "said bank, and should therefore be set aside." Prays for answers under oath and for account of the moneys, property and effects received from Holmes, and that all sales, transfers, etc., "may be set aside and decreed to be made in fraud of the

rights of your orator and the other creditors of the said bank;" and "the said stockholders and each of them be subjected to "the liability created by the statute thereon in the same manner "and to the same extent as though such sales, transfers or "surrenders had never been made, and that the said stock-"holders or such of them as have sold, transferred or surren-"dered, or pretended to sell, transfer or surrender, etc., the "shares of stock so as aforesaid held and owned by them at the "time the said bank suspended payment in the manner as afore-"said, may be decreed to hold the moneys, property and effects "received by them for said stock in the manner as aforesaid "in trust for the creditors of the said bank, and upon the respect-"ive amounts being ascertained that they be decreed to pay the "same to creditors thereof, or to such person or persons as your "Honor shall order or direct; that an account be taken of all "the present indebtedness of the said bank as far as the same "can be ascertained; that an account be taken of the amount "*due your orator and the other judgment creditors of the said* "*defendant bank who have been made parties to this proceeding* "*by interpleader or otherwise*, and that your orator's said judg-"ment be decreed to be a first lien upon all the moneys, "property and effects of the said bank discovered by this pro-"ceeding; that an account be taken of the amounts due from "each of the said defendants to your orator and the judgment and "other creditors of the said bank, as stockholders thereof, upon "the basis of the number of shares of stock held by them at the "time the said bank suspended payment in the manner as afore-"said, *in pursuance of the provisions of the act under which* "*the said bank was organized, and by which the liability of* "*the stockholders thereof is fixed and determined*; that a full "and complete and accurate account be taken of all the sales, "transfers or surrenders, or pretended sales, transfers, etc., of "stock made by the said stockholders of the said bank, or

"any of them, after the same suspended payment, in the man-
"ner as aforesaid, and of the amounts received by them
"respectively for any such sales, transfers, etc., and that they
"may be decreed to hold the same in trust for the creditors of
"said bank in the manner as hereinbefore prayed; and that
"upon such accounts being taken the said defendants, or such
"of them as shall be found liable to your orator and the judg-
"ment and other creditors of the said bank, upon the said
"stock liability created by the said Bankruptcy Act, and such
"of them as shall be liable for the amounts received by them
"for the sales and transfer of stock, so made by them in the
"manner as aforesaid, be decreed to pay whatever amounts
"shall be due from them and each of them respectively into
"court or to the receiver duly appointed by said court; and
"that out of the fund so created your orator's judgment be
"paid in full and the balance thereof be distributed among the
"other creditors of said bank in such way and manner as your
"Honors shall direct." (P. Rec., 33, 34.)

December 4, 1876, defendants, Alonzo Richmond, William M. Tilden, Marshall Field, John N. Gage and Joseph L. McDuffy moved the court to strike the amended bill from the files upon the ground that it was based upon a different ground of complaint from that of the original bill and was inconsistent with said original bill, and with the prayer of the original bill, and that the matters set up in the original bill could properly only be granted upon supplemental bill, and the matters set up in the amended bill could not properly be set up by way of amendment or substitute for the original bill. Of these, defendant Richmond is one of the appellants and Messrs. Field and Gage, the amounts adjudicated against whom are less than five thousand dollars each, are protected by the decree until this appeal can be determined.

Tilden died between the delivery of the final opinion and the rendition of the final decree, and the cause stands below as to him upon bill of revivor, but I represent, on the appeal the administrator of Tilden as well as Messrs. Field and Gage.

appellants' counsel in this c.

The amended answers of Richmond, Field, Tilden and Gage reiterate the objections made in the motion. (P. Rec., 180, 182, 183, 184, 185.)

May 7, 1879, the cause was referred to Henry W. Bishop, Esq., master, to take proofs and report. (P. Rec., 157.)

January 18, 1883, he filed his report of the testimony and exhibits introduced before him. (P. Rec., 190.)

The cause was set down for hearing upon the pleadings and proofs May 30, 1883. (P. Rec., 231.)

And on the 23d day of July, 1883, the opinion of the Circuit court was filed in said cause. (P. Rec., 254.)

On the same day an interlocutory decree was entered which commences: "Now come the parties by their respective "solicitors, and by leave of court said complainants amend "their *amended* bill herein *so as to show* that the same is filed "in behalf of said complainants *and all other creditors* of said "bank; and the prayer of said amended bill is also amended to "correspond with said amendment; and that defendants "have leave to answer said amendment instanter." (P. Rec., 261.)

The interlocutory decree then proceeds to hold the defendants liable and set aside all transfers of their stock, and refers the case to Henry W. Bishop, Master, to take proofs and report: first, the amount of the debts of said bank still unpaid, and the amount due each creditor thereof; second, the

value of the assets, if any, of the bank; third, the amount of assessment necessary to be made on each share of the capital stock of said bank in order to fully pay the indebtedness of the bank; and he shall also report the amount due and payable from each shareholder upon such assessment.

On the same day complainants filed their amendments to the amended bill of complaint as follows:

"In the first paragraph, after the words 'amended bill,' in-
"sert 'on behalf of himself and all other creditors of the Man-
"facturer's National Bank of Chicago'; in the prayer: that an
"account be taken of the amount due your orators and the
"other judgment creditors of the said defendant bank, who
"have been made parties to this proceeding by interpleader or
"otherwise' strike out the word 'judgment'; strike out the
"prayer 'and that your orator's said judgment be decreed to
"be a first lien upon all the moneys, property and effects of
"the said bank discovered by this proceeding'; strike out the
"prayer 'and that out of the fund so created your orator's
"judgment be paid in full and the balance thereof be dis-
"tributed among the other creditors of the said bank in
"such way and manner as your Honors shall direct,' and
"insert, 'and that the fund so created be distributed among
"all the creditors of said bank *pro rata*, in such way
"and manner as your Honors shall direct.'" (P. Rec., 241.)

On the same day Alonzo Richmond, Charles Comstock, Marshall Field, William M. Tilden, J. N. Gage and others, filed their answers to the amended bill as amended by the amendments filed July 23d, *by setting up the statute of limitations of five years.*

Subsequently the case was taken up before the master, and the bar of the statute was interposed on behalf of all the defendants to the claims as severally presented.

The objection of the statute had also been made before the master as against claims presented after the lapse of five years, before the rendition of the interlocutory decree. (P. Rec., 222, 224.)

Adams having died, his administrator presented the question that the claim did not survive. The court held otherwise in an opinion delivered July 14, 1884. (Printed Rec., 276.)

January 6, 1885, the master made his report (Printed Rec., 285), to which exceptions were duly filed by Charles Comstock, William M. Tilden, Marshall Field, Alonzo Richmond, John N. Gage, William H. Adams, administrator, Thomas Lord and other defendants. (Printed Rec., 475, *et seq.*)

May 21, 1886, the exceptions having been in the meantime heard, the court overruled the same, and re-referred said cause to the master "to compute from the proofs already "taken in the case, first, the indebtedness of said bank at the "time of the failure thereof; second, subsequent actual payments upon indebtedness; third, net amount of indebtedness, with interest on same at the rate of six per cent. per annum from the time of the failure of the bank down to the present time; fourth, necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership. (Printed Rec., 487.)

May 27, 1886, the master filed his supplemental report, finding and reporting that on the 23d day of September, A. D. 1873, the aggregate indebtedness of the bank was $410,064.10; that the subsequent actual payments upon said indebtedness were $213,018.46; that the net amount of indebtedness was the sum of $197,045.64; that the interest upon said last mentioned sum, from the 23d day of September, A. D. 1873, when the bank failed, down to the 21st day of May, A. D. 1886, at

the rate of six per cent., was the sum of $149,686.98; making the total unpaid indebtedness $346,732.62; that twenty per cent. upon said last mentioned sum, amounting to $69,346.52, is necessary to be added thereto for the expenses of the receivership; making a total of $416,079.11; and that the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership, is eighty-three and two-tenths per cent. upon the capital stock of $500,000. (Printed Rec., 487, 488.)

To this supplemental report the objections and exceptions filed to the previous report were stipulated to be considered as re-filed, and additional exceptions were filed on behalf of the defendants thereto. (Printed Rec., 489, 490.)

On the first day of June, 1886, the opinion of the court was filed in the clerk's office. (Printed Rec., 491.)

And on the same day the final decree was entered, for the recovery of $416,079.11, distributed into the amounts against each defendant equal to $83\frac{2}{10}$ per cent., from which these appeals are prosecuted, on behalf, not only of the appellants, but of all the defendants who were unable to appeal, on account of the respective amounts adjudged against each being less than $5,600, and whose rights are guarded in that respect by the terms of the decree. (Printed Rec., 496.)

On the 30th of June, 1886, an act of Congress was approved, entitled "An act authorizing the appointment of re-"ceivers of national banks, and for other purposes," section 1 of which provided that whenever any national banking association should be dissolved under section 5,239 of the revised statutes, "or whenever any creditor of any national banking "association shall have obtained a judgment against it in any "court of record, and made application, accompanied by a cer-

"tificate from the clerk of the court stating that such judgment "has been rendered, and has remained unpaid for the space "of thirty days, or whenever the comptroller shall become "satisfied of the insolvency of a national banking association, "he may, after due examination of its affairs, in either case, "appoint a receiver, who shall proceed to close up said asso- "ciation, and enforce the personal liability of the shareholders, "as provided in section 5,234 of said statutes."

And section 3 of which is as follows: "That when any "national banking association shall have gone into liquidation "under the provisions of section 5,220 of said statutes, the "individual liability of the shareholders provided for by sec- "tion 5,151 of said statutes may be enforced by any creditor "of such association, by bill in equity, in the nature of a cred- "itor's bill, brought by such creditor on behalf of himself and "of all other creditors of the association, against the share- "holders thereof, in any court of the United States having "original jurisdiction in equity for the district in which such "association may have been located or established."

Assignment of Errors.

I.

The Circuit court erred in allowing the amendment of July 23, 1883, by which it was attempted to turn a creditor's bill into an original bill for the enforcement of a statutory stock liability under the act of June 30, 1876.

II.

The court erred in holding that the amended bill of October 5, 1876, was a supplemental bill, and, as such, sustainable under the act of Congress of June 30, 1876.

III.

The court erred in holding that the amended bill of October 5, 1876, was a bill on behalf of the complainant and alt other creditors.

IV.

The court erred in holding and proceeding to decree upon the theory that the statutory stock liability was part of the assets of the bank.

V.

The court erred in overruling the defense of the statute of limitations and in rendering a decree against the stockholders for an amount covering the entire alleged indebtedness of the bank with interest, when as to the largest part thereof the claims were barred by that statute.

VI.

The court erred in including in the decree a large number of claims which had been extinguished in the process of liquidation, and in including in the decree a large number of claims based upon engagements entered into after liquidation had commenced.

VII.

The court erred in including in the decree the sum of $149,686.98 for interest.

VIII.

The court erred in overruling the exceptions, and each of them, to the master's reports, and in rendering a decree upon the master's supplementary report.

IX.

The court erred in rendering a decree against appellant Comstock, as the owner of 150 shares of stock, whereas he was not liable in any view upon to exceed 50 shares.

And herein also the court erred in setting aside transfers of stock in favor of creditors who did not attack the same until years after the statute of limitations had barred such attack.

Brief and Argument.

An examination of the four opinions which were delivered from time to time in this case, and which will be found in 6 Bissel, 301, and on pages 254, 276 and 491 of the printed record herein, will sufficiently disclose the theory or theories upon which the learned judge of the court below proceeded, and I will preface my observations in support of the first, second, third, fourth and fifth errors assigned with a quotation from the last opinion, which will, I hope, render the differences in judgment and conclusion between the learned judge and ourselves perfectly clear.

On page 492 of the printed record he says:

"The original bill in this case was strictly and technically a creditor's bill filed by James Irons as a judgment creditor of the bank, and seeking to obtain possession of the legal and equitable assets of the bank, to prevent waste by the officers of the bank then in possession of them. It did not seek to enforce a shareholder's liability, nor looked for any decree in that regard. After the passage of the act of June 30th, 1876, an amended and supplemental bill by leave of the court was filed, in which it was attempted to enforce the shareholders' liability. Some of the allegations in the prayer of this amended and supplemental bill indicate that the pleader who drew it was still of opinion that the complainant would have a right to priority of payment by reason of diligence in the commencement of the proceeding; and this bill contained no clause or statement that it was filed in behalf of the complainant and all other creditors. It seems to me that this clause in the bill was entirely unnecessary, and that being filed under the statute, which directed that it could only operate in behalf of the complainant and all other creditors, the law gave direction and force to all that could be done under it and that the provision of the act of 1876, authorizing the filing of this bill, is not to be considered as a rule of practice or a rule for the framing of the bill, but as a rule defining the rights of parties under such a bill; and that whether such a bill professed upon its face to be filed in behalf of com-

plainant and all other creditors, the court would give it such direction and force and no other; and that hence from the time this amended and supplemental bill was filed in October, 1876, it has been a proper bill under which to enforce the individual liability of these shareholders. Taking this view of the case, I therefore conclude that when this amended and supplemental bill was filed, it brought all the creditors of the bank before the court, and was a bill for their benefit as much as if they had been complainants or parties to it in any form; and that therefore, if the statute of limitations had begun to run in favor of the bank against its creditors, the filing of this bill was the bringing of a suit by each creditor so as to suspend the running of the statute. For the purposes of asserting their rights, it was not necessary, I think, for creditors to intervene and make themselves parties to this proceeding, but the court, looking upon this as a special case of statutory jurisdiction, would consider the bill as a suit by each creditor for the purpose of enforcing the collection of his debt."

With entire respect for the well known ability and learning of the district judge, I am constrained to differ with these views in nearly every particular.

It appears to me that he is in error in holding the *amended* bill of October 5, 1876, to have been "filed under the statute of June 30, 1876." It does not on its face purport to have been, and it is not framed upon that theory. So far as the stock liability is referred to (and it forms no very definite ground of relief, as the court will see upon examining the pleading), it is such a bill as the learned judge conceived might be filed *even in the absence of the statute of June 30, 1876*, notwithstanding the decision of this court in *Kennedy* v. *Gibson*, 8 Wallace, 498 (approved *U. S.* v. *Knox*, 102 U. S., 422; *Casey* v. *Galli*, 94 U. S., 673), which it was insisted in *Irons* v. *Manufacturers' National Bank*, 6 Bissell, 301, and in the opinion of July 23, 1883, in this case (P. Rec., 258) this court would not fully adhere to.

Nor can I assent to the ruling that the amended bill of October 5, 1876, is or can be properly styled a "supplemental" bill, and I am the more confirmed in the correctness of this

dissent in view of the fact that leave was applied for and granted to file an "amended" bill; the bill so describes itself and is so described in the opinion of July 23, 1883, but is called "supplementary" in the opinion of July 14, 1884 (p. 276), and "supplemental" in that of June 1, 1885. Of course, it is what it is, no matter what it is called, and I understand it *not* to be a supplemental bill.

I do not agree that "it is not a matter of substance, but "only a mere matter of form," whether the bill should purport upon its face to be filed in behalf of "all other creditors," as held July 23, 1883 (p. 256), and I am confident that the amended bill, in form and substance, was not intended to be and was not a bill bringing all the creditors of the bank before the court. This might perhaps be of less consequence if the amended bill had been filed "under the statute" of June 30, 1876, as is assumed by the learned judge; but I submit that this is not so. It is not only nowhere stated to be filed under that statute, but, on the other hand, prays for an account of the amounts due from defendants as stockholders, upon the basis of the number of shares held by them, etc., "in pursu- "ance of the provisions of the act under which the said bank "was organized." (Printed Rec., 34.)

Again, the question upon the statute of limitations is not simply whether the statute had begun to run "*in favor of the bank*, "*against its creditors*," but whether it had run in favor of the stockholders against the creditors, and I insist that even, *if the amended bill of October, 1876, was a bill for the benefit of all the creditors, the filing of it was not the bringing of a suit by each creditor, so as to suspend the running of the statute as between the bank's creditors and the stockholders, or the bank and its stockholders, or for that matter, between the bank and its creditors.*

This last proposition is of vital importance, as the larger part of the $416,079.11 decreed is made up of claims that were not presented in any form until after the bar of the statute was complete.

I.

THE CIRCUIT COURT ERRED IN ALLOWING THE AMENDMENT OF JULY 23D, 1883, BY WHICH IT WAS ATTEMPTED TO TURN A CREDITOR'S BILL INTO AN ORIGINAL BILL FOR THE ENFORCEMENT OF A STATUTORY STOCK LIABILITY UNDER THE ACT OF CONGRESS OF JUNE 30, 1876.

"A creditor's bill merely subrogates the creditor to the "place of the debtor and garnishees the debt due to the in- "debted corporation, and does not change the character of "the debt attached or garnished."

Hatch v. *Dana*, 101 U. S., 211.
Patterson v. *Lynde*, 112 Ill., 204.

Equity relieves, first, where equitable assets which cannot be reached by execution, are sought, and in that case there must be judgment and execution returned *nulla bona*—that is, the remedy at law must be exhausted. *Smith* v. *R. R. Co.*, 99 U. S., 400; *U. S.* v. *Pacific R. R. Co.*, 98 U. S., 569; *McConnel* v. *Dickson*, 43 Illinois, 109. Second, where the creditor has the right at law, but seeks a court of equity to remove an obstruction fraudulently interposed. Here he must have recovered judgment. It is the judgment which gives him an equitable interest or estate as the basis of the bill. *Fleming* v. *Grafton*, 54 Miss., 85, and cases cited; *Weis* v. *Tiernan*, 91 Ills., 31; *Jones* v. *Green*, 1 Wallace, 330. Third, in some cases where the debtor is dead, or dead and insolvent. *McDowell* v. *Cochran*, 11 Ill., 31; *Ray* v. *Cook*, 31 Ill., 336.

Fourth, where the object of the bill is to reach property held in trust for the benefit of the creditor. This is the case of a direct or express trust. It is the case of property held specifically for the benefit of creditors. *Jones* v. *Green*, 1 Wallace, 330; *Beach* v. *Bestor*, 45 Ill., 346.

In *Terry* v. *Anderson*, 95 U. S., 636, the court says: "Ordinarily a creditor must put his demand into judgment against "his debtor, and exhaust his remedies at law before he can "proceed in equity to subject choses in action to its payment. "To this rule, however, there are some exceptions, and we are "not prepared to say that a creditor of a dissolved corporation "may not, under certain circumstances, claim to be exempted "from its operation. If he can, however, it is upon the ground "that the assets of a corporation constitute a trust fund, which "will be administered by a court of equity in the absence of a "trustee, the principle being that equity will not permit a trust "to fail for want of a trustee."

The original bill in the case at bar was a creditor's bill, pure and simple, and the amended bill of October 5, 1876, was in form and substance also a creditor's bill.

Leave was given to amend the original bill, and the complainant presented what he called, and correctly, an amended bill, substantially seeking no other relief than that already sought. He made the stockholders parties defendant, and alleged that they had received certain assets of the bank for their stock, which he said they had fraudulently transferred to Holmes. These assets the amended bill sought to recover; and it also asked that the amount due, under the statutory obligation of the stockholders, be ordered paid into court in addition to the surrender of the assets, in order that, out of the fund so created, the complainant's judgment might be paid in full.

The complainant assumed that what the stockholders might be obliged to pay on the statutory liability would be assets of the bank, and he sought in the amended bill, as he had in the original bill, to be subrogated to the place of the corporation.

The bill and amended bill simply seek to secure assets and garnishee debts due to the indebted corporation. If this amended bill were otherwise than this the objection of multifariousness would have been fatal to it.

The cause of action, under the act of Congress of June 30, 1876, is between the creditors and stockholders *ex directo*. The cause of action under these creditors' bills is by way of subrogation through the corporation for the recovery of assets and debts. The two causes of action are distinct and independent, and could not be properly joined in one bill.

Story's Equity Pleadings, Sec. 271.
Walker v. *Powers*, 104 U. S., 245.

Treated as creditor's bills, as the original bill and the amended bill were, the learned judge of the court below had no difficulty in holding that the bill was not multifarious. Upon the hearing, however, the court allowed the bill to be so amended as to be turned into a bill, filed by the complainant on behalf of himself and other creditors, and to amend the prayer so as to ask for a *pro rata* distribution instead of the payment of the complainant in full. This made a a new bill of it, and is directly condemned in *Shields* v. *Barrow*, 17 Howard, 144, in which the true rule, that this cannot be permitted, is said to be laid down in *Verplank* v. *Mercantile Insurance Co.*, 1 Edwards' Chancery, 46.

Snead v. *McCoull*, 12 Howard, 407, 422.
Walden v. *Bodley*, 14 Peters, 156.

Of course, this let in the defendants to make a new defense,

if they had any, and they interposed the statute of limitations, which had been running up to the 23d day of July, 1883, when this amendment was made.

It is true that it is stated in 2 Daniels' Ch. Pl. & Pr. (4th Amer ed.), page 245, that: "The court will generally, at the hear-"ing, allow a bill which has originally been filed by one indi-"vidual of a numerous class, in his own right, to be amended "so as to make such individual sue on behalf of himself and "the rest of the class." But it is respectfully submitted that rule is settled that the court will not permit a bill to be so amended on hearing as to make an entirely new case. *Smith* v. *Woolfolk*, 115 U. S., 148. If the amendment had the effect of entirely changing the nature of the case and the frame of the record it would not be allowed. *Goodwin* v. *Goodwin*, 3 Atk., 370. *Milward* v. *Oldfield*, 4 Price, 325. *Denniston* v. *Little*, 2 Sch. & Lef., 11 n. In any view the bill would be treated as an entirely new bill then for the first time filed.

The case of *Bushy* v. *Seymour*, 1 Jones & Tourche, 527, cited on page 46 of Mr. Miller's brief, is directly in point.

II.

THE COURT ERRED IN HOLDING THAT THE AMENDED BILL OF OCTOBER 5, 1876, WAS A SUPPLEMENTAL BILL, AND AS SUCH SUSTAINABLE UNDER THE ACT OF CONGRESS OF JUNE, 30, 1876.

The amended bill of October, 1876, did not purport to bring into the case any matter occurring subsequently to the filing of the original bill, and in its nature supplemental and supporting what had been alleged before.

"Matters which have occurred since the original bill was

"filed, and which are material to perfect the plaintiff's case "may be introduced into the record by supplemental bill."

Story's Equity Pleadings, Secs. 335 and 336.

But a plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff must dismiss his original bill and file an entirely new one.

Milner v. *Milner*, 2 Edwards Chancery, 114.

Pinck v. *Anthony*, 10 Allen, 477.

Nor can a plaintiff support a bad title by acquiring another after the filing of the original bill, and then bringing it forward by supplemental bill.

2 Dan'l's Ch. Pl. & Pr. (4th Amer. Ed.), 515, and notes.

In this case the plaintiff had filed a creditors' bill. More than a year afterwards Congress passed an act under which the creditors of a National bank might bring suit to enforce the stock liability against all its stockholders. If this October, 1876, bill had been filed, under that act, it would have been clearly an original bill in itself, and the original bill in this case should have been dismissed. But this amended bill of October, 5, 1876, does not purport to be filed under the act of June 30, 1876, but asks the ascertainment of the amounts due "in pur- "suance of the provisions of the act under which the said bank "was organized," nor does it purport to be a supplemental bill. Leave was given to file an amended bill, and the pleader describes his amended bill as an amended and not a supplemental bill. Nor was the word "supplemental" used in regard to it, so far as I can find, until in the opinion of the court, filed June 1, 1886 (page 492), although it is called "supplementary" in the opinion of July 14, 1884 (P. Rec., 276).

The bill of October 5, 1876, would also, as we have seen, been multifarious, had it been what the court now holds it was.

I submit, therefore, that this amended bill, not only by reason of its terms and the relief sought, but under the established rules of equity pleading, was neither supplemental nor multifarious, because it was what it professed to be—an amended creditors' bill, and it was not, and did not pretend to be, a bill under the act of Congress of June 30, 1876, and that therefore the court erred when it held, upon the final argument, that it occupied any such attitude.

III.

THE AMENDED BILL OF OCTOBER 5, 1876, WAS NOT A BILL ON BEHALF OF THE COMPLAINANT AND ALL OTHER CREDITORS.

This appears from the examination of the amended bill itself, which is the original bill, with an amendment. Even as amended, it was a bill under which the complainant sought priority of payment by reason of superior diligence. Nor does it purport to be on behalf of the other creditors. If it had been intended to be a suit on behalf of the complainant and others, a demurrer would have lain for want of parties if they had not been so described in the bill. This is, in this case as in many, matter of substance, and not of form. "The bill must state the fact that it is filed in behalf of the complainant and all others, etc." (*Fish* v. *Howland*, 1 Paige, 20.) This must be done in all cases where the suit is instituted on behalf of complainant and others. (1 Daniels Chancery, 245.) "If it be brought for "the plaintiffs alone it will not be sustained by the court for "want of proper parties." (Story's Equity Pleadings, Sec. 107.) "But a few creditors will not be permitted to bring a "bill of this sort for an account, and administration of the

"assets, without saying in the bill that it is brought on behalf "of themselves and all the rest of the creditors." (Story's Equity Pleadings, Sec. 99.) And it is quite clear that under the act of June 30, 1876, the complainant *must* make the other creditors parties, and *must* say so.

IV.

THE COURT ERRED IN HOLDING AND PROCEEDING TO DECREE UPON THE THEORY THAT THE STATUTORY STOCK LIABILITY WAS PART OF THE ASSETS OF THE BANK.

In *Irons* v. *Manufacturers' National Bank*, 6 Bissel, 301, the court held, referring to the case of *Kennedy* v. *Gibson*, 8th Wallace, 478, that at all events a court of equity had power "to "take hold of whatever assets the bank might have aside from "the personal liability of the stockholders," and accordingly appointed a receiver.

The amended bill of October 5, 1876, was principally directed to the recovery of assets of the bank alleged to have passed into the hands of the stockholders, but it also referred to the stock liability, and asked that an account be taken of the amount due in respect thereof, "*in pursuance of the provisions of the act* "*under which the said bank was organized.*" And it was further prayed that the assets and whatever amount might be due from the defendant stockholders might be paid into court, etc., and "that out of the fund so created" complainant might be paid in full and the balance distributed. The theory of this amended bill, is, so far as it relates to stock liability, that such liability was an asset of the bank. In his opinion of July 23, 1883, the learned judge says that under the national banking act "the diligence of a creditor who files a cred- "itor's bill, especially for the purpose of enforcing the

"stockholder's liability can give him no greater rights "than are given any other creditor to share in the "distribution of the assets" (page 256). And further (page 257) that the amended bill is not multifarious; that the original bill "was a creditor's bill"; that "the scope of the bill is in "no degree changed. It is at most only enlarged in refer- "ence to the number of persons to be acted upon and to some "extent in reference to the character of the liability of such "persons"; that "the decree against the stockholders would "be in no sense contradictory to a decree against any other "person who might be defendant for the purpose of reaching "assets in his hands, or securing the payment to the receiver "of any liability which was owing to the bank."

In his opinion of July 14, 1884, the learned judge says (page 276): "From all the various provisions of the act it seems to "me that it was the intention of Congress to make this lia- "bility, to the extent of the par value of the stock, over and "above what the stock had cost, an asset of the bank to be "resorted to in the event of insolvency, or a guarantee fund, "so to speak, in case the property of the bank was insufficient "to pay its debts."

In the opinion of June 1, 1886 (page 492), the learned judge says that the act of June 30, 1876, implies "that the fund ob- "tained by the enforcement of the statutory liability of the "shareholder shall go in with the general assets of the bank "and be equally distributed to all." It is perfectly clear that the court was of the opinion from the beginning that this stock liability was an asset of the bank.

Section 5151 of the United States Revised Statutes pro- vides:

"The shareholders of every national banking association "shall be held individually responsible, equally and ratably,

"and not one for another, for all contracts, debts and engage-
"ments of such association, to the extent of the amount of
"their stock therein, at the par value thereof, in addition
"to the amount invested in such shares."

In the case of *Godfrey* v. *Terry*, 97 U. S., 171, it appeared that the Merchants' Bank of South Carolina suspended specie payments November 13, 1860, and never thereafter resumed. The charter of the bank contained a provision that, in case of the failure of the bank, "each stockholder, copartnership or "body politic having a share or shares in the said bank at the "time of such failure, or who shall have been interested therein "at any time within twelve months previous to such failure, "shall be liable and held bound individually for any sum not "exceeding twice the amount of his, her or their share or "shares."

The court held that upon the failure of the bank a right of action immediately accrued to the creditors, and that the statute of limitations began to run from that time.

In *Terry* v. *Tubman*, 92 U. S., 156, the charter of the Bank of Augusta provided "that the individual property of the "stockholders in said bank shall be bound for the ultimate re-"demption of the bills issued by said bank in proportion to the "number of shares held by them respectively; and, in case of a "failure of said bank, all transfers of stock made within six "months prior to a failure or refusal on the part of said bank to "redeem its liabilities in specie when required shall be void, and "the private property of the individual or individuals transfer-"ring said stock shall be liable for the redemption of the bills "of said bank, as above stated."

This court says: "We are of the opinion that it is not neces-"sary first to exhaust the assets of the bank by legal pro-"ceeding. The case is not so much like that of the guaranty

"of the '*collection*' of a debt, where the previous proceeding "against the principal debtor is implied, as it is like a guaranty "of '*payment*' where resort may be had at once to the guar- "antor without a previous proceeding against the principal. "*Morris* v. *Wadsworth*, 11 Wend., 100; S. C., 17 Wend., 103; "2 Pars. Bills & N. pp. 142, 143." And the court held that the proper proceeding to enforce such liability is by suit in equity, where all the claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made; and that the liability of the stockholders arose when the bank ceased to redeem, and was notoriously insolvent, and the statute of limitations *as to such liability*, began to run from that time.

Tested by these cases, it is clear that the liability under this section in question is to the creditors, and is not part of the assets of the bank.

"Individual liability is repugnant to the law of corporations "and qualifies, in this case, an exemption which would other- "wise exist. Stockholders, in such cases, are liable according "to the plain meaning of the terms employed by the legisla- "ture, and not otherwise."

Carrol et al. v. *Green et al.*, 92 U. S., 509.

"Whether this liability be designated as a 'statutory lia- "bility,' or a 'collateral statutory liability,' or a 'statutory "penalty,' it was not created for the benefit of the bank, could "not be collected, sold or released by the bank, was in no "respect under its control. But on the other hand, it belongs "solely to the creditors, and is under their control."

Jacobson v. *Allen*, 12 Fed. Rep., 455.

Mr. Justice NELSON, delivering the opinion of this court, in *Hawthorne* v. *Calef*, 2 Wal., 10, treats this liability as a *guaranty to the creditors*. He says:

"Now, it is quite clear that the personal liability clause in the "charter, in the present case, pledges the liability or guarantee "of the stockholders to the extent of their stock, to the cred- "itors of the company, and to which pledge or guarantee the "stockholders, by subscribing for stock and becoming mem- "bers of it, have assented. They thereby virtually agree to "become security to the creditors for the payment of the debts "of the company, which have been contracted upon the faith "of this liability."

Under similar provisions the decisions of the state courts are practically unanimous to the effect that such liability is not an asset, as the cases cited by Messrs. Hurd and Miller, from New York (25 N. Y., 215; 15 N. Y., 44); Michigan (37 Mich., 184); Ohio (17 Ohio St., 86); Georgia (8 Ga., 468), and Maine (50 Me., 271) show.

This is conceded by the district judge, but he insists that the construction of the personal liability clause in the national bank act should be different from the construction of the same or equivalent language, in a state statute, because, he says, that the comptroller's receiver, when he enforces the personal liability, puts the money so derived with the bank's assets and divides ratably from all the money so accumulated.

But the having one repository for all he collects, or the payment of creditors partly from one source and partly from another does not change the character of the source from whence the money is derived. In getting in the property of the bank he acts in the place of the bank; in collecting from the stockholder he acts for the creditor; and it cannot be properly said that the stockholder pays the bank when he responds on a guaranty of its engagements.

Under the second section of the act of June 30, 1876, the

creditors really need no receiver, and if one be appointed it is simply as a matter of convenience to act *for* them in the matter of collecting a liability *to* them.

The bank is then in voluntary liquidation, and if the creditors are in the meantime paid by the stockholders the latter take the assets.

The creditors are required to sue the stockholders in equity because the benefits are to be equally distributed and the defendant's liability is ratably and in proportion, and because the liability may not be to the full extent of the par of the stock. The money obtained in the creditor's suit need not go into the general assets, and in fact the process of liquidation may be conducted by the bank and the bank may be sued and collection enforced without any reference to the creditor's suit against the stockholders. This is the ruling in *Ins. Co.* v. *Bank*, 104 U. S., 54, in which the creditor pursued the liquidating bank in one action and the shareholders in another.

The distinction between involuntary and voluntary liquidation is clearly made in the act, but is ignored in the opinion of the Circuit court.

It was said by Mr. Chief Justice WAITE, in *Pollard* v. *Bailey*, 20th Wallace, 526, that "the individual liability of stockholders "in a corporation for the payment of its debts is always a "creature of statute; at common law it does not exist. The "statute which creates it may also declare the purposes of "its creation, and provide for the manner of its enforcement." * * * "A general liability, created by statute, without a "remedy, may be enforced by an appropriate common law "action. But where the provision for the liability is coupled "with a provision for a special remedy, that remedy, and that "alone must be employed."

And in *Kennedy* v. *Gibson*, 8 Wallace, 506, it was held that in the instance of *involuntary* liquidation creditors must seek their remedy through the comptroller in the mode prescribed by the statute.

The act of June 30, 1876, has made no change of the rule in this regard.

In all cases of *involuntary* liquidation resort must be had to the comptroller and the remedy be enforced by his receiver, but in cases of voluntary liquidation the creditors may pursue the stockholders by bill in equity, which, however, does not permit the appointment of a receiver to take the assets of the bank out of its own control and turn a voluntary into an involuntary liquidation without the interposition of the comptroller.

But if a bill could be filed to reach the assets proper of the bank, although the bank was in voluntary liquidation, as it was held in *Irons* v. *Man. Nat. Bk.*, 6 Bissell, 301, might be done, the receiver appointed in such case would take *virtute officii* only those assets, but not the personal liability. The decree in this case is in fact erroneous in going in favor of the receiver.

Nor can the cause of action against defendants as having property of the bank be joined with the cause of action based on the personal liability. (*Cambridge W. Works* v. *S. Dyeing & B. Co.*, 14 Gray, 193; *Pope* v. *Leonard*, 115 Mass., 286; *Walker* v. *Powers*, 104 U. S., 245.)

In *Queenan* v. *Palmer*, 117 Illinois, 619 (advanced sheets), involving the construction of a bank charter providing that the stockholders should "be responsible, in their individual "property, in an amount equal to the amount of stock held by "them, respectively, to make good losses to depositors or "others," it was held that the individual liability was primary,

and constituted a common fund for the security of creditors, "out of which depositors may be paid, "as well as out of the assets of the bank itself," and that the meaning of the term "losses" could not be restricted to the difference between the depositor's claim and what he might realize by an action against the insolvent bank, because that would be treating the responsibility imposed upon the stockholders as secondary to that of the bank, whereas it was primary, and "again it would render it necessary for the "depositors, by bill, for it could not be done otherwise, to pro- "cure a ratable distribution of the assets of the insolvent cor- "poration among all persons interested. After that should be "done, then in like manner to proceed against the common fund "arising from the statutory liability of the stockholders. The "law has imposed no such duty upon the depositor. He may "proceed against one or both funds at his election. A party "having more than one remedy, is at liberty to pursue *either* "*or all* until he has obtained satisfaction of his claim."

As remarked in *Nat. Bank* v. *Ins. Co.*, 104 U. S., 76, "it is "a cumulative remedy and against other persons, and can not "be considered as an objection to the rendition of the present "decree" against the bank.

V.

THE COURT ERRED IN OVERRULING THE DEFENSE OF THE STATUTE OF LIMITATIONS, AND IN RENDERING A DECREE AGAINST THE STOCKHOLDERS FOR AN AMOUNT COVERING THE ENTIRE ALLEGED INDEBTEDNESS OF THE BANK, WITH INTEREST, WHEN, AS TO THE LARGEST PART THEREOF, THE CLAIMS WERE BARRED BY THAT STATUTE.

Chapter 83 of the revised statutes of Illinois treats of limitations, and sections 12 and 15 are as follows:

"Section 12. The following actions can only be commenced "within the periods hereinafter prescribed, except when a dif- "ferent limitation is prescribed by statute.

"Section 15. Actions on unwritten contracts, express or "implied, or on awards of arbitration, or to recover damages for "an injury done to property, real or personal, or to recover the "possession of personal property, or damages for the deten- "tion or conversion thereof, and all civil actions, not otherwise "provided for, shall be commenced within five years next after "the cause of action accrues." (Revised Statutes Ill., 1881, page 705.)

This has been the statutory period since 1845.

2 Starr & Curtiss Annotated Stat., 1,552.
Myer's Stats., 1871-2, p. 431, Sec. 15.

Under this statute all civil actions not otherwise provided for must be commenced within five years after the cause of action accrued, and whenever by suit at law or bill in equity or petition or presentation of claims the creditors of a national bank seek to recover against its stockholders, such proceeding is, within the statute, a civil action "not otherwise provided

for," and is barred in five years. Illustrations of the application of the limitation to civil actions not otherwise provided for are numerous. Action on account is barred in five years. So also is a bill for account in matters cognizable in action of account at law.

Quayle v. *Guild*, 91 Ill., 378.

That case rules "the action of account is not specifically "provided for in the statute of limitations and therefore is em- "braced in that clause of the statute which declares that *all* "*civil actions not otherwise provided for* shall be barred unless "commenced within five years next after the cause of action "shall have accrued.

"Where there is a legal and an equitable remedy in respect "to the same subject matter, the latter is under the control of "the same statutory bar as the former.

"The administrator of a deceased partner has his remedy "at law by action of account as well as by bill in chancery "against the surviving partners for an account. So if the ad- "ministrator shall resort to his remedy in chancery in that re- "gard, the suit will be subject to the limitation of five years, "as that would have controlled the remedy at law had it been "resorted to."

So also bill for account of proceeds of sale is barred in five years.

Hancock v. *Harper*, 86 Ill., 445.

So also bill by partner for an account is barred after five years from dissolution.

Pierce v. *McClellan*, 93 Ill., 245.

Action on foreign judgment is barred in five years.

Bemis v. *Stanley*, 93 Ill., 230.

Suits in equity by school directors of one district against school directors of another district to recover money paid by mistake is barred after five years.

School Directors v. *School Directors*, 105 Ill., 653.

Again under this statute the lapse of five years bars the implied promise of the stockholders to fulfill the engagements of the corporation, arising from their acceptance of the act creating it.

Carroll v. *Green*, 92 U. S., 510.

This of course would be equally true as between *the corporation and its stockholders*, if the obligation were from the latter to the former. Indeed, as *between the corporation and its creditors*, the bar of the statute is complete in five years, unless the latter claim under written contract. In the case at bar, a large number of the claims were originally based upon open accounts, and in respect to them no proof of obligation in writing was made.

It is obvious that the statute begins to run from the date when the liability of the shareholders becomes fixed in the sense that the creditor may without obstruction proceed against them.

Thompson on Liability of Stockholders, § 260.
Baker v. *Atlas Bank*, 9 Met., 182.

In the case at bar, the bank suspended payment according to the substantially uncontradicted testimony of Holmes (P. Rec. 334) on the 25th of September, 1873, and went into voluntary liquidation September 26, 1873.

The complainant charges in his amended bill (P. Rec., 26), "that the said bank suspended payment, closed its doors, and "ceased to transact business as a bank on or about the 22d "day of September, A. D. 1873; that at the time of the said

" suspension, and for a long time prior thereto, the said bank " was and had been insolvent and unable to pay its debts, and " has ever since continued to be and now is utterly and wholly " insolvent and unable to pay its now existing debts, or any " part thereof," and in the original bill that "on or about the " 11th day of October, A. D. 1873, the said bank closed its " doors against the depositors and refused payment of your " orator's check for the amount so as aforesaid due him, and " suspended business;" and also sets up the recovery of judgment and return of execution *nulla bona*.

The interlocutory decree finds (page 262) that the bank " became insolvent and suspended payment September twenty- " third (23d), 1873, and in pursuance of the said act went into " voluntary liquidation on September twenty-sixth (26th), 1873."

The largest portion of the indebtedness at the time of the failure was in open account, and the creditors could have proceeded at once, without obstruction, against the stockholders in enforcement of their personal liability, yet during the five years from September 26, 1873, to September 26, 1878, claims for only $35,467.53, including that of complainant, were brought into the case in any way, and $5,840.91 that subsequently dismissed.

The largest part of the entire indebtedness was therefore barred under the statute, and it may also be remarked that many claims were not presented in any way until in 1882 and subsequently, nine years and upwards after the bank failed and went into liquidation, seven years and upwards after the receiver was appointed and six years and upwards after the approval of the act of June 30, 1876.

In *Pollard* v. *Bailey*, 20 Wallace, 520, it was said that "a " general liability created by statute without a remedy may be " enforced by an appropriate common law action. But

"when the liability is coupled with a provision for a special "remedy, that remedy, and that alone, must be employed," and in the case of the South Carolina Bank in *Godfrey* v. *Terry*, 97 U. S., 171, and of the Georgia bank in *Terry* v. *Tubman*, 92 U. S., 156, it was held that the appropriate mode of proceeding was in equity, that the burden and the benefits might be equally distributed, but the right or liability was of course the same in either form of action.

Before the act of June 30, 1876, no mode was provided for the enforcement of the liability for the benefit of general creditors when the bank was in voluntary liquidation, and they were at liberty to enforce their rights according to the rule in *Pollard* v. *Bailey*, affirmed in *Godfrey* v. *Terry* and *Terry* v. *Tubman* by an appropriate action at law or in equity.

It is true that it is said in *U. S.* v. *Knox*, 102 U. S., 422, that "the act of 1863 made no provision for enforcing the "personal liability of shareholders, while that of 1864, 13 Stat. "at L. 100, provided that it might be done through a receiver "appointed by the comptroller and acting under his direction. "R. S. Sec. 5234," and *Kennedy* v. *Gibson*, 8 Wall., 498, and *Casey* v. *Galli*, 94 U. S., 673, are approved, but the court is speaking of the case where the bank is in *involuntary* liquidation. Where *voluntary* liquidation was going on no special remedy was provided prior to June 30, 1876, and if the bank did not pay the creditors were left to enforce their rights, as in any case where the manner of enforcement was not declared by the statute creating the liability.

The theory of such a bill, as the Circuit court holds this amended bill to be, and of such a bill as the second section of the act of 1876 provides for, and of such a bill or action as might have been brought in the first instance is, that the creditors sue, not as judgment creditors who seek to be substi-

tuted in the place of the indebted corporation, but as creditors at large to whom the stockholders are directly liable, and though their remedy is in equity it is to be enforced directly against the stockholders, and not through the corporation.

But the theory of the original bill as amended October 5, 1876, was that the personal liability was *to the corporation* and to be reached by subrogating the creditor to the place of the corporation.

In this view no privity exists between the stockholder and any creditor of the corporation.

He can only be reached by the creditor through the corporation; and if the debt due from the stockholder is barred by the statute of limitations against the corporation, the creditor of the corporation cannot enforce its payment in equity.

Cherry v. *Lamar*, 58 Ga., 541.
Branch v. *Kraffi*, 61 Ga., 615.
Mfg. Co. v. *Bank*, 6 Rich. Eq. (S. C.), 234.
Terry v. *Anderson*, 95 U. S., 635.
Bassett v. *Hotel Co.*, 47 Vt., 313.

This puts the personal liability upon the same ground as an unpaid subscription to stock which "is part of the assets of "the corporation, at least so far as creditors are concerned. "The liability of the stockholders to the creditors is through "the corporation, not direct. There is no privity of contract "between them."

Patterson v. *Lynde*, 106 U. S., 521.

I am clear that this liability is *not* of that class, but if it were, the bill would merely operate to garnishee the liability and the statute would run as against creditors until they became actors in some way.

And the running of the statute of limitations between the corporation and the stockholder can not be suspended by the recovery of judgment against the corporation or by any note or written obligation of the latter, given by its officers after it has gone into liquidation.

In *Stilphen* v. *Ware*, 45 Cal., 110, the court says: "It is "conceded that irrespective of the judgment rendered against "the corporation itself, the cause of action stated in the com- "plaint is barred by limitation. And if this be so, it is clear "that the judgment did not of itself operate to prolong the "time in which an action might be brought against the defend- "ants as stockholders of the corporation. (*Davidson* v. "*Rankin*, 34 Cal., 503; *Banahe* v. *Baldwin*, 35 Cal., 168; "*Hahn* v. *Rosenbaum*, 39 Cal., 646.)"

A judgment is evidence when the suit is to enforce a subscription to stock, but not even *prima facie* where it is to enforce stock liability.

Hastings v. *Drew*, 76 N. Y., 9.
Miller v. *White*, 50 N. Y., 137.
McMahon v. *Macy*, 51 N. Y., 155.
Un. Bk. v. *W. M. & M. Co.*, 17 S. C. (N. S.), 339.

This bank was in voluntary liquidation and therefore in the condition of a dissolved co-partnership.

Nat. Bk. v. *Ins. Co.*, 104 U. S., 74.

No new debt can be made after insolvency declared by involuntary liquidation.

White v. *Knox*, 111 U. S., 784.

After a copartnership is dissolved, neither of the former partners has authority to bind the firm by new contracts, not even a partner authorized to settle.

SHAW, C. J., *Parker* v. *Macomber*, 18 Pick., 505.

"To liquidate a balance is to pay it."

STORY, J., *Fleckner* v. *Bank*, 8 Wharton, 362.

Stock liability cannot be renewed or extended by any renewal or extension made by the creditor with the corporation.

Parrott v. *Colby*, 6 Hun., 55, affirmed on opinion of the court below in *Parrott* v. *Colby*, 71 N. Y., 597.

The liability of a national bank shareholder for the debts, contracts and engagements is, of course, for the debts, contracts and engagements of the bank existing when it ceases business, and not for new debts, contracts and engagements.

Whether the personal liability of the stockholder is directly to the creditor as I insist, or to the corporation, the defense of the statute of limitations should have been sustained to a large part of these claims.

We have seen that the bill as amended did not purport to be and was not brought on behalf of all the creditors, and no others than complainant were parties except as they intervened and became such, as some did to the amount of less than $30,000.

And if the amendment of July 23, 1883, changing the bill into one on behalf of all the creditors had been properly allowed, which we deny, it simply amounted to a new suit as to all creditors then made parties, and the statute ran as to them up to that date.

Busby v. *Seymour*, 1 Jones & Tourche, 527.
Allen v. *Link*, 5 Lea (Tenn.), 454.
Christmas v. *Mitchell*, 3 Ired. Eq., 535.
Holmes v. *Trout*, 7 Peters, 181, 214.
Same case, 1 McLean, 1.

Miller's heirs v. *McIntyre*, 6 Peters, 61.
Sicard v. *Davies*, 6 Peters, 124.
I. C. R. Co. v. *Cobb*, 64 Ill., 141.
Phelps v. *I. C. R. R. Co.*, 94 Ill., 548.

But if the bill had been originally filed on behalf of all the creditors, it would not have prevented the running of the statute as to those creditors who did not in fact make themselves parties in any way until the bar was complete.

Whenever a fund is brought into court for distribution among creditors, each creditor may set up the bar of the statute as against those who have not become actors in the case, and certainly any one who is called on to contribute can raise the same objection on his own behalf, so as to reduce the amount he will be obliged to pay. The rule is correctly laid down in *Abraham* v. *Meyers*, 40th Maryland, 499, that: "In a "suit instituted for the benefit of creditors generally, or where, "as in this case, creditors are called in by authority to receive "distribution from a fund under the control of the court, the "day of filing the petition to be admitted as a creditor, or the "day of filing the voucher or evidence of the claim, is considered "as the commencement of the suit as to such creditor, and "from that day the statute ceases to run against the claim; "from that day the claimant becomes a party to the proceed-"ings, and is entitled to participate in their further prosecution; "but, to entitle him to this *status*, he must come into court in "the proper case as a party claimant, and be ready to assume "the burden of establishing his claim against any opponent "who may lawfully resist it."

So in *Hall* v. *Creswell*, 12 Gill. & J., 36, it was held that the statute of limitations runs against a claim of debt up to the time it is exhibited or filed in chancery.

Nor does it matter that the proceeding is in the equity court. All these claims were legal claims, and it has long been the settled rule in Illinois, that where a claim is in the nature of a legal claim, though enforceable in equity, the statute of limitations applies directly and furnishes a complete bar to the prosecution of the suit. The court can exercise no discretion, and acts not upon analogy, but in obedience to the statute.

Hancock v. *Harper*, 86 Ill., 450.
Quayle v. *Guild*, 91 Ill., 383.
Castner v *Walrod*, 83 Ill., 171.

This is also the rule in this court.

Carroll v. *Greene*, 92 U. S., 509.
Gordon v. *Kimmell*, 99 U. S., 201.

The question as to whether the principal debtor could avail himself of the statute where the bill was on its face on behalf "of all other creditors" does not arise.

Nor is it necessary to refer to the distinction between creditors who come in before and those who come in after a decree, because this personal liability is not assets; and if it were, the bar may still be interposed by creditors as between themselves, or by a party required to contribute.

Inasmuch as this personal liability was not part of the assets of the bank, the case of *Sterndale* v. *Hankinson*, 1 Simons, 383, relied on in the court below, has not the slightest application, even if not otherwise distinguishable as it is.

That was a bill filed by complainants on behalf of themselves and all the other creditors of a trader, one *Hankinson*, deceased, whose widow had carried on the business and gone into bankruptcy, seeking to apply the intestate's real and personal assets in payment of his debts, and the vice chancellor

(Hart) declined to hold other creditors than the complainant's barred from sharing in the assets, upon the ground that the circumstances of the case made it inequitable to apply the statute by way of analogy in favor of the assignees in bankruptcy of the widow, or of the widow as administratrix, upon the mere objection of the master.

The statute of James (21 James, I.) applied to "suits in law," and Jessel, M. R., in the case *in re* Graves, deceased, *Bray* v. *Tofield*, Law Reports, Chancery Div., Vol. XVIII., p. 551, points out that in the case of a claim which can only be enforced by action, the statute of James applies and *Sterndale* v. *Hankinson* does not.

The statute of William the Fourth "was intended," says the court in *Berrington* v. *Evans*, 1 Young and Collyer, Exchequer, 434, "to put an end altogether to the discretion of courts of "equity where they had before acted by analogy to the time "limited at law"; and *Sterndale* v. *Hankinson* was not only held not to apply but was otherwise distinguished and its operation qualified. This case holds that the coming in of a claimant is the *commencement* of the proceeding on his part.

The terms of the statute of Illinois and the decisions under it render this case entirely inapplicable. It can, of course, never be in point where the court must apply the bar in obedience to the statute, and not by analogy.

Carroll v. *Green*, 92 U. S., 509, and cases.
Lawrence v. *Trustees*, 2 Denio, 57.
Breckenridge v. *Chutchill*, 3 J. J. Marshal, 15.
Quayle v. *Guild*, 91 Ill., 378.

It is unnecessary to prolong the discussion under this point.

The learned judge of the court below held, as matter of law, that the statute was to be considered only as between the bank

and its creditors, and did not bar any of the claims, no matter when presented, because he held that the amended bill of October 5, 1876, was a bill on behalf of all the creditors, and it was not necessary for them to intervene in fact; and in accordance with that view, he included in the decree the claims to be found on pages 469, 470, of the printed record, which do not appear to have ever been presented by the alleged creditors at all, but only by the receiver's attorney, who makes affidavit thereto from "personal investigation" and "outside knowledge" January 31, 1884. These all appear to be barred as between the bank and the alleged creditors, who are to be conclusively presumed to have abandoned their cause of action.

We respectfully contend that the Circuit court was in error in holding that the question of the statute arose only as between the bank and its creditors, and also in holding that the amended bill of October 5, 1876, suspended the running of the statute as to creditors, who did not come in, in fact, until the bar was complete.

VI.

THE COURT ERRED IN INCLUDING IN THE DECREE A LARGE NUMBER OF CLAIMS WHICH HAD BEEN EXTINGUISHED IN THE PROCESS OF LIQUIDATION, AND IN INCLUDING IN THE DECREE A LARGE NUMBER OF CLAIMS BASED UPON ENGAGEMENTS ENTERED INTO AFTER LIQUIDATION HAD COMMENCED.

The manner of liquidating is fully set forth in the testimony of Ira Holmes (P. Rec., 334, 335, *et seq.*) and is well described by Mr. Hurd on pages 8 and 9 of his brief.

Mr. Harvey, the receiver, called on behalf of complainant, testifies (P. Rec., 206): "Their process of keeping the accounts "as ascertained by an examination of the books upon taking

"possession was, after making settlements with A, B and C, "turning out notes or bills receivable of the bank, they "charged the man's account balancing the account, and credit- "ing bills payable account, in that way closing up his account, "so that the books show all their accounts to have been "balanced."

Of the entire indebtedness all but less than forty thousand dollars was settled shortly after September 26, 1873, partly in bills receivable, and partly in cash. Many of the bills receivable were secured by real estate, and the security went with the notes. Some of them were notes which the bank held at the time it commenced liquidating, and some were taken from debtors of the bank after that date, and all were payable *at a future date*. In some instances, the bank, by its president, simply endorsed the paper; in others, it undertook to guarantee it. In other cases, the creditor, instead of taking paper held by the bank, took Ira Holmes' individual notes guaranteed by the bank, Holmes executing the guaranty as its president. In the latter case Holmes would take of the bills receivable of the bank an amount equal to his notes thus given to its creditors. Whatever was done in making this settlement, was done by Ira Holmes acting for the bank as its president, or J. A. Holmes acting as cashier, and pursuant to such agreements as they could make with the creditors. They received no instructions from the stockholders or directors except that contained in the resolution to go into liquidation. *In each instance the creditor gave his check to close the account.* (Testimony of Holmes, P. Rec., 334, 335.) There is no evidence of want of good faith in any of these settlements.

The court held as a matter of law:

"That Mr. Holmes, the chief executive officer of the bank, had the power to bind the bank and the shareholders, by endorsements or guaranties *in the due course of business*, as well after the vote to go into liquidation as before.

(*Bank* v. *Insurance Co.*, 104 U. S., 54; *People's Bank* v. *National Bank*, 101 U. S., 181.) Turning over this commercial paper, upon the debts of the bank was not the contracting of a new debt, but an attempt to satisfy an old one, and the endorsements or guaranties of the paper only operated to keep the obligation of the bank alive and give the holder recourse over against the bank in case the paper turned over was not collectible." (Page 495.)

This question of the powers of the officers of a national bank to bind the shareholders by endorsements or guaranties after the bank has gone into liquidation, is of great public importance, and it is also of importance to the appellants in the case at bar, as most of these claims apparently rest upon such endorsements or guaranties. (Pr. Rec., 226.)

The cases cited by the learned judge do not sustain the position he takes.

In *Bank* v. *Insurance Co.*, 104 U. S., 54, it is said that the going into liquidation resembles "the dissolution of a co-"partnership, which nevertheless continues to subsist for the "purpose of liquidation and the winding up of its business."

In *White* v. *Knox*, 111 U. S., 784, it is held in the case of involuntary liquidation that the "business of the bank must "stop when insolvency is declared. (Rev. Stat., Sec. 5228.) "No new debt can be made after that."

In *People's Bank* v. *National Bank*, 101 U. S., 181, it was simply held that a national bank had power *prior* to going into liquidation to guarantee the payment of notes.

It seems to me contrary to the policy of the law to hold that creditors could arrest the course of liquidation by taking the assets of the bank as collateral security, or to be applied on their demands when collected. And that, likening the going into voluntary liquidation to the dissolution of a co-partnership, such dissolution operates as a revocation of all authority for making new contracts. Thus it was held that a surviving

partner could not give a note (*Lockwood* v. *Comstock*, 4 McLean, 383) or accept a bill in the firm name after dissolution for a pre-existing debt of the firm (*Tombeckbee Bank* v. *Dumell*, 5 Mason, 56), even though it be antedated so as to bear date before the dissolution. (*Wrightson* v. *Pullan*, 1 Stark., 300; *Lansing* v *Gaine*, 2 Johns., 300.) He cannot renew bills or notes given by the partnership before dissolution so as to bind his former co-partner.

Palmer v. *Dodge*, 4 Ohio State, 21.
National Bank v. *Norton*, 1 Hill, 572.
Parker v. *Cousins*, 2 Grattan, 372.
Martin v. *Kirk*, 2 Humphrey, 529.
Long v. *Storey*, 10 Mo., 638.
Stone v. *Chamberlain*, 20 Georgia, 259.

Power to give a note in renewal of one given before dissolution is denied in *Lumbermen's Bank* v. *Pratt*, 51 Maine, 503, and *Cunningham* v. *Bragg*, 37 Alabama, 436.

In *Parker* v. *McComber*, 18 Pickering, 505, where an individual note payable to a firm was held until it was overdue, it was held that another partner could not after the dissolution of the partnership negotiate it in the partnership name, although he was authorized to settle its concerns; and Chief Justice SHAW says: "The endorsement was a new contract made by "one in the name of the firm after dissolution. No such "authority belonged to one or two partners after a dissolution "of the partnership by the general rules of the mercantile law "arising out of their relation as partners, and we think it "equally clear that no such authority was conferred by the "agreement of dissolution and notice authorizing them to col-"lect the debts and settle and close the concern. * * * "But if this was so, the general rule of law would be that

"an authority to settle the business would be of course an "authority to endorse negotiable securities, but the general "rule is clearly otherwise."

But an endorsement "without recourse" was held proper to pass the title after dissolution.

Waite v. *Foster*, 33 Maine, 424.
And see *Yale* v. *Eames*, 1 Metcalf, 486.

Of course one partner after dissolution may bind his co-partner by any of the above acts if he have an express authority for that purpose, but it is impossible to see how such authority can be derived from the vote of the stockholders to put a national bank into liquidation.

See resolution to do so, etc., on pp. 520, 521, P. record.

The National Banking Act (Rev. Stat., section 5,136), gives to every bank created under it the right to exercise by its board of directors or duly authorized agents all such incidental powers as shall be necessary to carry on the business of banking by discounting or negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, etc., but of course these powers are to be exercised while the bank is a going concern, and not when it is in liquidation. Endorsements and guaranties are not then "in due course of business," as the Circuit court supposes. The complainants, indeed, claim the bank was wholly insolvent, and that may be conceded so far as ability to pay demands upon it in the ordinary course of business was concerned, although it is undoubtedly true that it was supposed by its officers and directors that it would pay out without serious difficulty. Now, in what did its condition differ from a bank put into involuntary liquidation by the comptroller? The

shareholders were liable for the *existing* contracts, debts and engagements, and not for any new ones; and in *Parrott* v. *Colby*, 6 Hun, 55, affirmed on the opinion given below by the court of Appeals, 71 N. Y., 597, it was distinctly held that "the liability of stockholders in such cases cannot be revived "or extended by any renewal or extension of indebtedness "which the creditor may make with the corporation." And see *Union Bank* v. *Wando, etc. Co.*, 17 S. C., N. S., 339.

If the power exist, then it would follow that shareholders would not be released by extension of the time of payment, but it is a general rule that anything whatever done by a holder of a bill or note which must necessarily have the effect of destroying, lessening or in any way embarassing the rights or remedies of other parties against parties to them, discharges all the parties thus injuriously affected from any claim by the holder himself, or by any who must claim by or through him. The receiving of security payable at a future time implies an engagement to wait until the security becomes due; and in the case at bar the shareholders were necessarily prevented from themselves realizing upon the assets by the fact that the creditors had taken them, and their situation when the creditors got through was changed for the worse from what it was in the outset.

And see

Hanson v. *Donkersley*, 37 Mich., 184.
Moss v. *McCullough*, 5 Hill, 131.
Sullivan v. *Sullivan Manufacturing Co.*, 20 S. C., 79.

Public policy forbids the officers of a national bank in liquidation to allow the creditors to experiment on the value of the assets, and after they have made ducks and drakes of them, to

turn up with a claim against the shareholders who had years before supposed themselves discharged of all liability in the premises.

The Circuit court held, however,

"That the creditors who took the commercial paper of the bank did not take it in payment of the indebtedness due them from the bank, but took it as collateral to such indebtedness, and that only so far as such paper has proved collectible and been made available by such creditors, should it be deemed a payment of the bank's indebtedness. I do not think the proof justifies the assumption that the creditors of the bank took this paper as absolute payment of their demands, but that they took it to be collected and applied upon their debts." (Pr. Rec., 495.)

But as matter of law the creditors must be presumed to have taken the assets of the bank in payment, for they could not take them in any other way; and again, the general rule is that the note of a third person is presumed to have been taken in payment, unless there is proof to the contrary.

Shaw v. *Republic Life Insurance Co.*, 69 N. Y., 286.

Starting with that presumption in this case it is difficult to see how the court could have arrived at the conclusion it did. Irrespective of claims respecting which there was no evidence, the evidence that the assets were not taken in payment is wholly insufficient to rebut the presumption. For instance, on page 402 printed record, Mr. Tallman testifies, in relation to the claim of the National Gold Bank of D. O. Mills & Co. for $6,847, with interest, that he does not recollect anything about what passed when he took notes in settlement. "I took what "securities I could get. Sam Walker papers I believe. Don't "remember the conversation." The following question was put to him:

"8. State what, if anything, was said to you, and by whom,

"with reference to the value of any such notes or papers so "taken by you, and what knowledge did you have of their "value?

"A. I don't know, it was so many years ago."

And then this leading question:

"9. State whether or not you accepted such notes or pa- "pers upon the faith of the aforesaid representations and state- "ments made to you, and upon the faith that the remedy "against stockholders was (not) impaired thereby?

"A. I took the paper as additional security, and did not "suppose that creditors lost any hold they had on stock- "holders."

Hadley (page 400), representing the National Bank of Lawrence for $2,500, says that he "had full faith that the remedy "against the stockholders was not impaired thereby."

Gould (page 390) representing a claim of the Grundy National Bank for $4,870, says: "The notes and papers taken by "me was *in payment* for the claims of the Grundy County "National Bank against the Manufacturers National Bank, and "was endorsed by the cashier or president of said bank," and in answer to interrogatory 8: "The notes and papers was de- "livered to me by the president or cashier of the bank, or "both of them. Some of them was represented to me to be "perfectly good. Some of the paper was secured by real es- "tate that was represented to be good. This was all I knew, "or knowledge I had of their value." And to the ninth, he says: "I did accept the notes and papers upon the statements "made, and I thought the endorsement of the bank held the "stockholders for the payment of notes *endorsed by the bank*."

Hooper, in relation to the Union National Bank of Oshkosh, claim for $5,751, says that he took the obligation of the

bank, the obligation of Mr. Holmes personally, and gave time on the claim. (Page 388.) In answer to the eighth interrogatory, he says: "I don't know that anything was said by "me, or in my presence, by any one, with reference to the "value of any securities which were taken for the Union Na- "tional Bank by Mr. Russell or myself, or that I had any "knowledge of their value, except that I derived from Mr. "Holmes' statement in regard to the debts and property of "the bank, and in regard to his own debts and property." To the seventh, he says: "I only recollect that we insisted on "holding all the claim we had, releasing nobody and nothing, "but getting in addition Mr. Holmes' personal liability." To the ninth he says: "I can't answer any further," etc.

Smart, testifying to a claim of $2,551.13, says (page 386): "I think the cashier said that he considered the notes good, "but a little slow; I had no knowledge of their value." Then the leading question is put to him: "State whether or not "you accepted such notes or papers upon the faith of the "aforesaid representations and statements made to you, and "upon the faith that the remedy against stockholders was not "impaired thereby?

"A. I certainly so accepted them."

Henrotin, as to the claim of Caldwell, Hamilton & Co. for a thousand dollars (page 410), puts in a letter that he wrote Caldwell, Hamilton & Co., December 31, 1873, in which he says he has settled the claim as he thought best under the circumstances, and further: "I do not consider the note which I "enclose herewith as A1, but I think it will be met. You will "note, however, that I have obtained the indorsement of the "bank upon the paper, so that eventually your claim on "the institution for $1,000 will be as good as ever, in case "paper is not honored at maturity." This witness can remember nothing outside of the letter.

These are illustrations of the evidence upon which the court proceeded.

Holmes testified as follows (P. Rec., 334):

"Q. In each case where you settled with the creditor of "the bank, and turned him out bills receivable of the bank, "how was that settlement—was it a payment, or what was the "transaction?

"A. It was a full payment of the demand. He gave me "his check on the bank for the amount, the same as if we "were doing a regular business, and the party should come in "and buy so much bills receivable, and give me a check on an "another bank.

"Q. Was there any case in which there was any under- "standing than that he took these bills receivable in payment "of his demand against the bank? A. Not any.

"Q. Did the parties in all instances understand the situation "of the bank and that you were in liquidation? A. Thor- "oughly."

It is quite clear from the evidence that the creditors took the assets of the bank in extinguishment of the original liability, but doubtless in many instances on the theory that they had the bank's guaranty or indorsement to fall back upon. The list of claims to be found upon page 323 of the printed record is almost wholly made up of claims in judgment or upon indorsements and guaranties, and no attempt was made to prove up on the original indebtedness until after October 24, 1882, at all events, when the list to which I refer was attached to the evidence of Mr. Mason (page 322), but after the opinion of the court of July 23, 1883, some additional evidence was introduced, which relates to a portion of the claims.

VII.

THE COURT ERRED IN INCLUDING IN THE DECREE THE SUM OF $149,686.98 FOR INTEREST.

The statement in the Master's supplemental report (p. 488), and upon which the decree was entered, is that interest is calculated from the 23d day of September, A. D. 1873, to the 21st day of May, A. D. 1886, and amounts to $149,686.98. I submit that under the circumstances disclosed in this record, the creditors who are entitled to recover at all, can not recover interest on their claims from the 25th day of September, 1873, when the bank failed, because they do not bring themselves within the statute of Illinois which provides (Chapter 74, Sec. 2, Rev. Stat., 1881, p. 650): "Creditors shall be allowed to "receive at the rate of six per centum per annum for all "moneys after they become due on any bond, bill, promissory, "note, or other instrument of writing, on money lent or "advanced for the use of another, on money due on the "settlement of account from the day of liquidating accounts "between the parties, and ascertaining the balance, on money "received to the use of another, and retained without the "owner's knowledge, and on money withheld by an unreason-"able and vexatious delay of payment." Now, it cannot be contended on behalf of creditors who took the assets of the bank and gave their checks in settlement of open accounts, and that was the great bulk of the indebtedness in this instance, that they can recover against the stockholders, interest as on money withheld by an unreasonable or vexatious delay of payment, or money due on a balance struck. Some demand in some form should have been made on the shareholders, and the creditors were certainly not entitled to any interest on the

original cause of action, while they were engaged in dissipating the assets of the concern. A difference of a few years' interest would be a difference of thousands of dollars. The interest on $197,045.64 for a year at six per cent. is nearly twelve thousand dollars, and it is not perceived upon what ground the stockholders should be cast in such damages under the circumstances.

VIII.

THE COURT ERRED IN OVERRULING THE EXCEPTIONS, AND EACH OF THEM, TO THE MASTER'S REPORTS, AND IN RENDERING A DECREE UPON THE MASTER'S SUPPLEMENTAL REPORT.

The exceptions severally present all the objections hereinbefore urged, and therefore should have been sustained in whole or in part.

But the objection to the allowance of $69,346.52 for "the expenses of the receivership" may be properly considered in this connection.

Mr. A. B. Mason testifies (P. Rec., 360), that he estimates "the expenses of collection will be some twenty per cent.," and twenty per cent. is what the master recommended and the court included in the decree.

It is submitted that when creditors bring suit to enforce the stock liability, the trouble and expense they are put to in the establishment of their claims are losses of the kind that fall "on every one who has the misfortune to be driven to the "courts for the judicial determination of his rights," and compensation for them cannot be included in the decree.

The sum of $69,346.52 for the expense of collection partakes of the liberality of the fees that are allowed in the wind-

ing up of great railroad corporations, and seems rather a disproportionate allowance, if any can be made at all, for bringing suit to recover on the liability in question.

As for the supplemental report to be found on page 488, the objection is apparent. It contains no finding as to the amounts coming to the several creditors, nor any items making up these estimates. Now each claimant is an independent suitor and must show his right to recover and the amount of his claim, and the defendants may contest both, the same as if such claimant were the only suitor. This supplemental report gives no data from which this court can see whether the amount is correct or not.

IX.

THE COURT ERRED IN RENDERING A DECREE AGAINST APPELLANT COMSTOCK AS THE OWNER OF 150 SHARES OF STOCK, WHEREAS HE WAS NOT LIABLE IN ANY VIEW UPON TO EXCEED FIFTY SHARES, AND HEREIN ALSO THE COURT ERRED IN SETTING ASIDE TRANSFERS OF STOCK IN FAVOR OF CREDITORS WHO DID NOT ATTACK THE SAME UNTIL YEARS AFTER THE STATUTE OF LIMITATIONS HAD BARRED SUCH ATTACK.

The amended bill of October 5, 1876, charged that while the bank was contemplating insolvency, and was in fact insolvent, and after suspension of payment, Mr. Comstock and other stockholders, combining with Ira Holmes, surrendered to Holmes their stock for the purpose of defrauding the complainant and other creditors of the bank, and answers were called for under oath. Mr. Comstock, in his sworn answer (P. Rec., 144), says that: "About in the year 1872, he was the "owner of 150 shares of said stock; that on or about the 8th day "of February, 1873, this defendant sold, assigned and delivered

" fifty shares of the said stock to Ira Holmes, and on or about " June, 1873, this defendant, sold, assigned and delivered fifty " other shares of said stock to Preston C. Maynard; that he " endeavored repeatedly to have said stock transferred on the " books of the bank, but that said Maynard refused to allow " said stock (to be) so transferred, although he had before " promised to have the same transferred; that at the time of the " said several sales of stock as aforesaid the said banking asso- " ciation was carrying on its regular business of banking, and " was in fact solvent and fully able to pay its debts, and, as he " is informed and believes, not indebted to any of the present " creditors of said bank. That afterwards, on or about the 23d " day of September, 1873, this defendant sold, assigned and de- " livered to the said Ira Holmes his other fifty shares of stock in " said bank, with other property, receiving in payment therefor " and for the other property sold to said Holmes at the same time " certain promissory notes of one William Patrick, payable to " the said Ira Holmes, and was secured with certain other notes " by mortgage from said William Patrick to said Ira Holmes, " which said notes and mortgage have proven to be of little " value to this defendant, in consequence of the incumbrances and " taxes upon said property, and the expense of foreclosing, and " how much of the value of said notes and security should be " attributable to the consideration of this sale of said stock, this " defendant is unable to state, but he insists that at the time " of said sale to said Holmes, this defendant was informed and " believed that said bank was able to pay all its debts in full, " and the consideration received by him was paid by said " Holmes out of his individual property, and not from the " assets or property of said bank."

Mr. Holmes testifies that there was no trouble of any kind with the bank at the time of the sale of fifty shares to Maynard (P. record, 341) June, 1873; and also that he bought and paid for the third fifty shares for full consideration.

(Holmes' testimony demonstrates his belief in the power of the bank to pay its indebtedness. He says (p. 340) that he gave $180,000 of his individual paper and paid all but $40,000, and took $180,000 of paper from the bank, every dollar of which he supposed to be good, but $80,000 of it proved to be bad. The creditors made this $40,000 out of Holmes by reason of his faith in the bank's assets.)

The complainants introduced no evidence whatever in support of their allegations of fraudulent intentions on the part of Mr. Comstock in making sale of the stock, but the stock books show (P. record, page 517) fifty shares canceled September 23, 1873, fifty shares transferred from Comstock to Ira Holmes, September 23, 1873. and fifty shares same date Sept. 24, 1873. Now, as to the first fifty shares which Comstock sold to Holmes in February, 1873, the evidence of his sworn answer is that he sold and delivered those shares to Holmes at that time, when the bank was in fact solvent and fully able to pay its debts carrying on its regular business of banking. It seems clear, therefore, that the case of *Whitney and others* v. *Butler, Receiver, etc.*, October term, 1886, 19 Chi. Leg. News, p. 85, applies, even although the transfer was not made on the books until September 23, for so far as appears Comstock knew nothing of that, and had done all that was requisite in delivering the shares to Holmes upon the sale. And this, it will be remembered, was in February, and the stock register was in Holmes' own custody. As to the second fifty shares, they were sold and the shares delivered to Maynard in June, 1873, but the answer says as to them that he repeatedly tried to get Maynard to make the transfer, and Maynard refused to do so, and it does not seem that, within the case just cited, Comstock should be held upon them because he failed to take legal steps to compel their transfer, when it is considered that Maynard had become the real owner, and under section 5,139 succeeded to all the rights

and liabilities of the prior holder. As to the other fifty shares that was not sold to Holmes until the 23rd of September, and that was so near the time of the failure that possibly Comstock should be held, although the transfer was perfectly *bona fide*. *Bozden* v. *Johnson*, 107, U. S. 261. The decree finds that the bank suspended September 23, 1873, but the evidence in the record seems the other way.

Holmes testifies (P. record, 334) that the bank continued carrying on its business in regular course up to and including the 25th. The evidence shows that a great deal of business in the receipt and paying out of money was done by the bank on the 23d, 24th and 25th. The evidence also shows that at the time the bank went into liquidation its officers supposed, and I have no doubt its creditors, that all its debts would be paid out of its assets, and Holmes testifies that he thought that there would be a large return on the stock.

So that the transfers were properly made at that time.

But it is to be remembered that the attack on the validity of the transfer of the stock was not made until the 5th of October, 1876, and was not only then made on a different ground from that on which the decree of the court rests, but was only made by the complainant and perhaps those who intervened prior to September 26, 1878, and was barred under the statute of limitations as to all creditors who did not make themselves parties to that bill until the bar of the statute was complete.

A suit in equity brought by a judgment creditor to impeach a release of liability on stock subscriptions made by a corporation to a stockholder, is subject to the bar of the statute of limitations.

New Albany v. *Burke*, 11 Wallace, 107.
Burke v. *Smith*, 16 Wallace, 401.

If any objection to the validity of the transfer of all these shares existed, still the transfer would not be void, but voidable only, at the election of complainants, and to give the benefit of the latter's election to *all the creditors* under a bill not filed on their behalf and after the bar of the statute had become complete, is inequitable.

And still more obviously unjust is it to do this as to the fifty shares sold in good faith in February, and the fifty in June, 1873, when the thunderbolt that struck the country in September was not discernible in a sky so clear that not even a cloud no bigger than a man's hand floated in it.

Respectfully submitted,

MELVILLE W. FULLER,

Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

No. 982.

ALONZO RICHMOND,
Appellant,
vs.
AGNES IRONS ET AL.,
Appellees.

Appeal from the Circuit Court, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT, ALONZO RICHMOND.

HENRY G. MILLER,
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No. 982.

ALONZO RICHMOND, *Appellant,*
vs.
AGNES IRONS ET AL., *Appellees.*

Appeal from the Circuit Court, for the Northern District of Illinois.

STATEMENT OF THE CASE.

This appeal is prosecuted by Alonzo Richmond, a citizen of Buffalo, N. Y., to reverse a decree entered in the Circuit court for the Northern district of Illinois, in May last, requiring him to pay into the hands of Joel D. Harvey, receiver of the property and assets of the Manufacturers' National Bank of Chicago, the sum of $8,320, under his statutory liability as the owner of one hundred shares of the par value of one hundred dollars each of the capital stock of said bank.

1-8 On the 3d of February, 1875, a bill of complaint was filed in the court aforesaid by James Irons against said bank and Ira Holmes, its president, alleging the recovery of a judgment in favor of complainant against the bank at the December term, 1874, for moneys he had at various times deposited with the bank—the issue and return of an execution upon said judgment; that the bank closed its doors and suspended business on or about the 11th day of October, 1873; that at the time of such suspension the bank had in its possession property and assets of the value of $1,500,000, and money and other assets treated as cash to the amount of $1,000,000 or thereabouts, and that its assets were largely in excess of its liabilities; that at the time of its suspension the bank, in pursuance of section 44 of the banking act under which it was organized, pretended to go into voluntary liquidation for the purpose of settling its affairs with the government and its creditors. The bill charges that for a period of six months thereafter the defendant Holmes, its president, did settle a large amount of the indebtedness of the bank, by giving notes made by him as president of the bank, and guaranteed by him, and by turning out some of the least available assets of the bank, and in some cases paying money; that a large amount of the assets of the bank which were on hand at the time of its suspension have been appropriated by defendant Holmes and other parties to their own use in fraud of complainant and other creditors of the bank; that at the time the bank went into liquidation defendant Holmes had in his own name and in his possession a large amount of real and personal property which he had purchased with the funds of the bank, some of which he still holds, and some of which he has sold to parties who hold the

same for him; that at the time of such suspension the circulating notes of the bank amounted to $438,750, secured by a deposit of bonds to the amount of $500,000; that after the bank went into liquidation, Holmes, acting for the bank, settled with the government and received the bonds deposited as security for said notes, and that said bonds or their equivalent are in his possession or under his control, and that at the time of the suspension the paid up capital of the bank amounted to $500,000. The bill prays for a discovery, and that the bank and defendant Holmes, as its president, may be required to deliver the property and effects of the bank into the hands of the court, and that so much thereof as may be necessary may be applied in payment of the amount due upon complainant's judgment, including interest. The bill prays for an injunction and for the appointment of a receiver for the property and assets of the bank.

Under this prayer Joel D. Harvey was appointed such receiver February 26, 1875, and immediately took possession of the effects of the bank. On April 1, 1875, the joint and several answer of the bank and Holmes was filed. In it Holmes denies all misconduct charged in the bill of complaint, and says that on the 25th of September, 1873, the bank, by vote of its shareholders owning two-thirds of its stock, went into voluntary liquidation under and pursuant to the 42d section of the national banking act, and complied with all the provisions and requirements of said section; that at that time its assets consisted of bills receivable of the nominal value of about $1,180,000, government bonds, $490,000, $70,000 due from other banks, $94,000 in bonds, and stocks about $70,000 and currency, $2,000; that said bank owed to depositors about $913,000, to bill

holders $438,750—that it had on hand when it turned over its assets to the receiver, bills receivable about $116,000, and bonds and stocks about $66,000 which are now nearly worthless; that it now owes unsettled claims due depositors amounting to about $39,000; that in the course of the voluntary liquidation all its most available assets were given to its creditors in settlement of their claims, and that all of such settlements were made
11–13 in good faith, etc. February 12, 1875, Joseph Shugart, Third National Bank of St. Louis, David
\ O. Smart and Charles Gudgell, were, upon their petition, received into the case as intervening judgment creditors. March 17th, Geo. W. Scott and John Wrigley were in like manner received as intervening
24 judgment creditors. December 10th receiver is
25 directed to sell Pickett notes for $1,100. Octo-
26 35 ber 5, 1876, complainant filed his amended bill of complaint, alleging that the bank suspended payment about the 22d of September, 1873, and was then, and has since continued to be, insolvent, and unable to pay its existing debts; that it went into voluntary liquidation in pursuance of the provisions of the banking act for the pretended purpose of settling with its creditors and closing its affairs; that a large amount of its indebtedness was settled, and that its then indebtedness was $40,000, or thereabouts; that because said bank went into voluntary liquidation, no receiver of its effects was ever appointed by the controller of the currency under the provisions of the banking act; alleging that certain persons, naming them, were stockholders at the time the bank went into liquidation, stating the amount held by each; that while the bank was contemplating insolvency certain of these persons (but not

including Richmond), for the purpose of relieving themselves from stock liability, sold their stock to Ira Holmes, who purchased the same with funds of the bank. The amended bill makes all the stockholders defendants, prays a discovery from each of them respecting such sales and transfers, and of the property received in exchange therefor; that such sales and transfers be set aside, and such stockholders subjected to their statutory liability to the same extent as if such transfers had not been made, and that they be decreed to hold the money received in exchange for such stock in trust for the creditors of the bank, and upon their respective amounts being ascertained, that they be decreed to pay the same to the receiver, etc.; that an account be taken of the present indebtedness of the bank, so far as it can be ascertained; that an account be taken of the amounts due complainant and other judgment creditors who have been made parties, etc.; that an account be taken of the amount due from each of the defendants under their statutory liability as stockholders to the creditors of the bank, and that the same, together with the sums received in exchange for stock, be paid into court, or to the receiver appointed by the court, and that out of the funds so created complainants' judgment be paid in full, and the balance distributed among the other creditors of the bank in such way
42 and manner as the court shall direct. On the 4th of December, 1876, Richmond, with others of the defendants, appeared and entered a motion to strike the amended bill from the files, on the ground, among others, that the matters set up in the amended bill cannot properly be set up by way of amendment, or as a sub-
57 stitute for the original bill. Bill revived in name of representatives of complainant. On the 2d of Sep-
58 tember, 1878, the First National Bank of Hastings

filed its petition, and was received as an intervening judgment creditor. Defendant Richmond's motion to strike out the amended bill not prevailing, his answer
133–137 thereto was filed December 5, 1878. On the
180, 181 18th of May, 1882, his amended answer was filed, insisting, among other things, that the complainant had no right to proceed against defendant to enforce his statutory liability as a stockholder of said bank, under an amendment of his original bill, but that such right, if it existed, must be made the subject-matter of an original suit, and claiming the same benefit as if he had demurred to the amended bill, for the causes therein set forth.

The following are the only claims brought into the case within five years from the time the bank suspended, or prior to the 25th of September, 1878, namely:

Estate of James Irons	$12,445.21
Joseph Shugard	407.35
Third National Bank of St. Louis	3,289.78
Smart and Gudgell	2,551.13
Scott and Wrigley	2,851.06
First National Bank of Hastings	13,923.00
In all	$35,497.53

The intervening petitions of the Third National Bank of St. Louis, and of Smart and Gudgell, were, on
151 motion of their solicitors, dismissed February 14, 1879, leaving $29,625.61 as the amount of the claims, for the collection of which proceedings had been instituted during said period of five years. Afterwards, and at various times during the month of December, 1878, and the years 1879, 1880, 1881 and 1882, other

creditors of the bank came in, filed their petitions, and were allowed to prove their claims against the bank.

157 On the 7th of May, 1879, the cause was referred to Henry W. Bishop, Esq, master in chancery, to take proofs therein and report the same to the court; and January, 18, 1883, he filed his report of the testimony

190 and exhibits introduced before him. The case was

261 heard in July, 1883, and at the hearing the complainants obtained the leave of court to further amend their bill "so as to show that the same is filed in behalf "of said complainants, and all other creditors of said "bank," and to amend the prayer of the bill so as to conform the same thereto. On the same day, to wit:

241 the 23d of July, 1883, the amendments were filed by inserting in the first paragraph, after the words "amended bill," the words "on behalf of himself and all "other creditors of the Manufacturers' National Bank of "Chicago," and in the prayer "that an account be taken "of the amount due your orator and the other judgment "creditors of said defendant bank, who have been made "parties to this proceeding by interpleader or otherwise;" by striking out the word "judgment;" by striking out the prayer, "and that your orator's said judgment be de- "creed to be a first lien upon all the moneys, property "and effects of the said bank discovered by this proceed- "ing;" by striking out the prayer, "and that out of the "funds so created your orator's judgment be paid in full, "and the balance thereof be distributed among "the other creditors of said bank in such way "and manner as your honor shall direct," and inserting in the place thereof: "and that the funds so created be distrib- "uted among all the creditors of said bank *pro rata* in "such way and manner as your honor shall direct". Of

course the purpose of this amendment was to place the proceeding under the second section of the amendatory statute of 1876. Its object is stated in the interlocutory decree of July 23d, to be "so as to show that the same is "filed in behalf of said complainants and all other creditors "of said bank," and the defendants were granted leave to answer said amendments instanter. On the same 244 day, to wit: the 23d of July, 1883, the answer of Alonzo Richmond to the last amended bill was filed, in which he says that the supposed liability of the said defendant, as a holder of the shares of stock in the said association, did not accrue to those persons, creditors of said bank, on whose behalf complainants, by their said amendment, claimed to bring said suit, and who are, by said amendment, made parties complainant in said suit, or to any or either of them, at any time within five years, next before the time of the filing of the said amended bill last mentioned, and the making of said persons parties complainant, in said suit, and that the right, if any, to enforce such liability is by the statute of limitation in such cases made and provided, forever barred, and he claims the same advantage of said statute, as if the same was by him specially pleaded to said bill as amended as aforesaid. He further insists in his answer to the amended bill "that "he ought not to be compelled to answer the said bill of "complaint as so amended because the same is against "other parties than stockholders in said corporation, the "Manufacturers' National Bank, and prays for further "and different relief from that authorized by the act of "Congress, approved June 30, 1876, and is therefore, "and in other respects, multifarious and inconsistent "and claims the same benefit therefrom as if he "had demurred to said bill of complaint as so

261 "amended." Thereupon the court entered its inter-
204 locutory decree, finding that it had jurisdiction of the subject matter and the parties to the suit, and designating the persons who were shareholders of the bank at the time of its suspension, and the number of shares held by each, and that the transfers of stock made by certain of the stockholders were in derogation of the rights of creditors, and invalid, and that the stockholders—naming them—were "individually responsible, equally and ratably, "and not one for the other, for all contracts, debts and en-"gagements of said bank to the extent of the amount of "stock standing in their names respectively on said 23d "day of September, 1873, (and before any transfers were "made that day), at the par value thereof, in addition to the "amount invested in such bank," and the cause was referred to Henry W. Bishop, Esq., master in chancery, to take proof and report:

"*First.* The amount of the debts of said bank still un-"paid, and the amount due each creditor thereof.

"*Second.* The value of the assets, if any, of the "bank.

"*Third.* The amount of assessment necessary to be "made on each share of the capital stock of said bank, in "order to fully pay the indebtedness of the bank, "and he shall also report the amount due and payable "from each shareholder upon such assessment."

By this amendment and interlocutory decree the proceeding was enlarged so as to embrace all the debts of the bank then unpaid without reference to when they were contracted or whether they were contracted by the bank in course of its business, prior to going into liquidation, or by its officers after it was placed in liquidation,

and the master was directed to report the amount of assessment necessary to be made on each share of the capital stock of the bank in order to pay the said debts in full. On the 6th of January, 1885, the master
285 filed his report with the evidence taken before him under this reference, in which he sets forth, in a paper attached to his report marked Schedule A,
287 the name of each creditor, and opposite his name the amount due him November 1, 1884, and that the footings show that the total amount of debts of said bank still unpaid to be $308,971.50 at that date; and he finds that all the claims mentioned in Schedule A are shown by the testimony to be valid and subsisting debts of said bank due and unpaid, and that the stockholders of said bank are liable for their payment, and that it will require an assessment of ninety per cent. upon each share of the capital stock of the bank in order to fully pay the indebtedness of the bank. The claims are numbered 1 to 79 inclusive. Claims numbered 51, 56 and 57 are for past services of the receiver and his attorneys, and aggregate $4,437.04. Schedule numbers 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 21, 23, 24, 28, 29, 30, 31, 32, 33, 36, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 49, 52, and aggregating $188,013.46, are upon indorsements and guarantees made in the name of the bank by its officers upon commercial paper turned over to creditors in settlement of their claims after the bank went into liquidation. After the evidence respecting these claims was taken before the master, to wit:

December 6, 1883, certain objections to the evidence
291 were waived, and it was stipulated that the same should be subject to all other objections that might be filed by either party within twenty days thereafter. On the

19th day of December, 1883, Richmond, with other defendants, filed objections in writing, in which they claimed, among other things, that the claims against the bank, presented to the master under said reference, were at the time of the amendment of said bill and of the entry of the interlocutory decree therein, and at the time of the presentment thereof before the master, stale claims, and barred by the statute of limitations as to each and every of the defendant stockholders; that each and every of the said claimants, whose claims appear to have arisen on account of guarantees or indorsements to them by or on account of said bank, accepted and received the notes and papers so guaranteed in payment of their demands, the said bank then being in course of voluntary liquidation, and the notes and papers then being the assets of the said bank, and that the stockholders are not legally liable for any claim or demand on account of such guarantees or endorsements, and that the said claimants are not entitled to prove their said claims as against the said defendants. (The master did not return these exceptions with his report.) On the 30th of February, 1885, appel-

478, 480 lant Richmond, with certain other stockholders, defendants, filed the following exceptions to the report of the master:

First. For reporting an assessment of ninety per cent. upon the basis of the allowance of the claims in Schedule A, attached to his report, whereas none of the claims were valid except the Ivons claim for $18,661.43, and Shugart claim, $629.72.

Second. For reporting that the necessary assessment on each share of stock was ninety per cent., when he should have reported an assessment of five per cent. or less.

Third. For reporting that these defendants are liable to be assessed to pay the following claims [here follows copy of Schedule A to master's report, omitting the Irons and Shugart claims], whereas the assertion of said claims and each of them, as against these defendants, and each of them, has long since been barred by the statute of limitations.

Fourth. For including attorneys' fees in the assessment, whereas these defendants are under no liability whatever for attorneys' fees, nor is either of them.

Fifth. For admitting to be proved against each of said defendants, claims accruing upon supposed guaranties and indorsements made by officers of the bank after it had gone into voluntary liquidation and ceased to do business; whereas, the master should have rejected all such claims. This exception applies to all such claims, whether in judgment or not.

Sixth. For allowing claims which have been released by the creditors of the bank, by taking, after the bank went into liquidation, paper not yet due, belonging to and a part of the bank's assets, in payment of such claims existing at the time the bank went into liquidation; whereas, said master should have rejected all of said claims and each of them.

Seventh. For allowing fees of Gardner and Schuyler, Joel D. Harvey, and Mattocks and Mason, for alleged services in this suit, for which these defendants are not liable; whereas, said master should have disallowed such claims.

Eighth. For allowing costs for obtaining judgment against the bank in various cases, and excessive interest,

and interest on interest in the cases of such judgments; whereas, the master should have disallowed the same.

Ninth. For that said master has allowed claims on behalf of persons who have never presented the same, and on behalf of persons who have not made the proof required by the rules of equity in such cases; whereas, said master should have disallowed the same.

Tenth. For finding an amount against the defendants largely in excess of the sum necessary to pay all the debts proven, and such allowance is therefore inequitable and unjust.

The case was heard upon the exceptions, March
485 17 and 18, 1886, and taken under advisement.

487 May 21, 1886, the exceptions were all overru'ed; but, for the purpose of equalizing the interest upon the claims the cause was referred back to the master "to "compute from the proofs already taken:

"*First.* The indebtedness of said bank at the time of "the failure thereof.

"*Second.* Subsequent actual payments upon indebted- "ness.

"*Third.* Net amount of indebtedness, with interest "on same at the rate of six per cent. per annum from the "time of the failure of the bank down to the present "time.

"*Fourth.* Necessary assessment upon the stockhold- "ers to pay said indebtedness, including the expenses of "the receivership."

488 May 27, 1886, the master filed his report, in which he says, that from an examination of the testimony already taken, he finds and reports "that the indebted-

"ness of said bank at the time of the failure thereof, to "wit: the twenty-third (23d) day of September, A. D. "1873, amounted, in the aggregate, to the sum of four "hundred and ten thousand and sixty-four dollars and ten "cents ($410,064.10); that the subsequent actual payments "upon said indebtedness amounted to the sum of two hun-"dred and thirteen thousand and eighteen dollars and forty-"six cents ($213,018.46); that the net amount of indebt-"edness was the sum of one hundred and ninety-seven "thousand and forty-five dollars and sixty-four cents "($197,045.64); that the interest upon said last mentioned "sum from the twenty-third day of September, A. D. "1873, when the bank failed, down to the twenty-first (21st) "day of May, A. D. 1886, at the rate of six per cent., is "the sum of one hundred and forty-nine thousand six hun-"dred and eighty-six dollars and ninety-eight cents "($149,686.98), making the total unpaid indebtedness of "said bank to the last mentioned date the sum of three hun-"dred and forty-six thousand seven hundred and thirty-two "dollars and sixty-two cents ($346,732.62); that twenty "per cent. upon said last-mentioned sum amounting to the "sum of sixty-nine thousand three hundred and forty-six "dollars and fifty-two cents ($69,346.52), is necessary to "be added thereto for the expenses of the receivership, "making a total sum of four hundred and sixteen thousand "and seventy-nine dollars and eleven cents ($416,079.11); "and that the necessary assessment upon the stockholders "to pay said indebtedness, including the expenses of the "receivership, is eighty-three and two-tenths (83 2/10) per "cent. upon the capital stock of five hundred thousand "dollars ($500,000.)"

489 On the same day appellant, Richmond, with others, refiled their former exceptions, and the following additional exceptions:

"*First.* That the master in estimating and finding the "amount due the several supposed creditors has allowed "and included interest upon their several demands, where- "as no interest whatever should have been allowed to "them oreither of them.

"*Second.* That the said master has allowed and esti- "mated twenty per cent upon the amount by him found "due, and in addition thereto for the purpose of provid- "ing for the fees and expenses of the receiver herein "whereas the said defendants are not liable to pay any "such expenses and fees.

"*Third.* That the per cent. required by the said mas- "ter to be paid by the defendant is larger than it should "in equity be, and is altogether excessive."

496 June 1, 1886, these exceptions were overruled and master's report affirmed, and a final decree entered 499 in which, among other things, appellant Alonzo Richmond, was ordered, adjudged and decreed to "pay "to Joel D. Harvey, the receiver in this cause, for the "benefit of all the creditors of said bank, $8,320 in sixty "days from the entry of this decree, with interest on said "amount at the rate of six per cent. per annum from the "entry of this decree down to the date of payment, and "that upon default in payment thereof the said receiver "may have execution therefor as in judgment at 502 "common law." Defendant, Richmond, with others, prayed an appeal which was allowed upon his filing within sixty days an appeal bond, with security to be 510 approved by the court. Appeal bond, duly approved, was filed June 8, 1886.

GROUNDS UPON WHICH A REVERSAL IS ASKED.

I.

The bill, as amended in October, 1876, was an ordinary creditor's bill, and under it the court could only reach the assets of the bank for the benefit of the complainant and the judgment creditors of the bank who had been permitted by the court to prosecute as co-complainants. As the statutory liability of the stockholders was not to the bank, but to the creditors of the bank, and therefore not an asset of the bank, it could not be enforced in this proceeding, and the bill should have been dismissed at the hearing as to those of the stockholders who were not charged with holding the property of the bank received in exchange for stock.

II.

As the right to enforce the statutory liability of stockholders by a proceeding in chancery under the second section of the act of July 30, 1876, accrued to complainant and other creditors of the bank long after the original bill was filed, it could not be enforced under an amendment of the bill, but should have been made the subject matter of an original suit.

III.

The bill as amended was multifarious as charged by Richmond in his amended answer of July 23, 1883, and for that reason should have been dismissed.

IV.

Nearly all the claims which the stockholders are by the final decree required to pay were as against the stockholders barred by the statute of limitations long before they were presented, or any steps taken against the stockholders to enforce their payment, and this neglect to prosecute should be regarded as conclusive evidence of an abandonment by these creditors of their causes of action against the stockholders, if any existed.

V.

Stockholders can only be required to pay the debts of the bank as they existed at the time it went into liquidation. ~~They cannot be required to pay debts made in the name of the bank by its officers after it has by them been placed in liquidation.~~ They cannot be required to pay debts made in the name of the bank by its officers, after it has by them been placed in liquidation in compliance with the provisions of the statute upon that subject, and therefore the claims of those of the creditors of the bank who received, after the bank went into liquidation, on account of their claims, commercial paper, assets of the bank at the time it went into liquidation, and endorsed or guaranteed in the name of the bank after it went into liquidation, should as against the stockholders have been rejected.

VI.

The court erred in finally taking the total amount of the indebtedness of the bank at the time of its suspension, less subsequent payments thereon, with interest on the balance at the rate of six per cent. per annum to the time of the decree, as the sum for the payment of which the stockholders are liable in this proceeding, without regard to the character of such indebtedness or to the defenses interposed by stockholders who had appeared ~~upon~~ in said suit, and without ascertaining how much was due to each creditor.

VII.

The court erred in imposing upon the stockholders the further burthen of twenty per cent. of the amount of such indebtedness, to wit: the sum of $69.346.52 to cover the expenses of the receivership.

VIII.

The Court Erred in directing the master under the order of reference of May 21, 1886 to compute from the proofs already taken in the case the indebtedness of said bank at the time of the failure thereof, and second, the subsequent actual payments upon said indebtedness.

IX.

The Court erred in overruling each and all of the Exceptions filed and refiled to the master's final report of the 27th of May 1886.

Argument.

It is a general rule that to reach the equitable assets of a debtor in real estate by suit in chancery the creditor should first obtain a judgment at law; and to reach personal property a judgment and execution should be shown. One exception to this rule is when the debtor is deceased; another exception is where the claim is to be satisfied out of a fund accessible only by the aid of a court of chancery.

O'Brien v. *Coulter*, 2 Black, 421.
Brinkerhoff v. *Brown*, 4 John. Ch., 671.
Cloud v. *Hamilton*, 3 Yerger, 81.
Rhodes v. *Cousins*, 6 Randolph, 188.

The original bill filed by Irons in this case is *not in the nature* of a creditor's bill, but is a creditor's bill pure and simple. The complainant alleged in his bill the recovery of a judgment against his debtor, the issuing and return of an execution *nulla bona*, thus placing himself in the predicament required by this rule of procedure, and prayed for a discovery of property *belonging to the defendant* to prevent its transfer, and to procure its appropriation by a decree of the court, when discovered, to the payment of his judgment in full. The bill asked for no other relief. As only judgment creditors can file a creditor's bill, only judgment creditors or parties in the same predicament with the complainants can be made co-complainants in such bill.

Accordingly, on the 12th of February, 1875 Joseph Shugart and the Third National Bank of St. Louis, filed their petition in this case, stating that they had recovered judgments against the defendant, and that executions had been issued thereon and returned *nulla bona*, and they were admitted by order of the court as co-complainants in the case. Again, on the 17th of March, 1875, George W. Scott and John Wrigley, judgment creditors of the bank, were in like manner by order of the court, admitted as co-complainants. If the case had gone to a final hearing as it then stood, the court manifestly could only have taken cognizance of the parties then before it, and of claims identified and described in the bill of complaint, and in the petitions filed by these judgment creditors. These parties would have been entitled exclusively to whatever assets of the defendant were discovered, and to have them applied to the payment of their judgments. They could not have been called upon to share them with any other creditors of the bank. It will be noticed that it is expressly alleged in the bill that the assets of the bank were at the time of its suspension largely in excess of its liabilities.

In what respect and to what extent was the bill subsequently changed? On the 5th of October, 1876, complainant filed his amended bill, in which he reiterates the allegation of the recovery of his judgment and the issue of an execution, and its return *nulla bona*, and alleges that certain parties, naming them, were stockholders of the bank at the time of its suspension; that certain of these parties had fraudulently transferred their stock to Ira Holmes, president of the bank, to escape their statutory liability, and that Holmes purchased the stock so fraudulently transferred to him, *with money and assets of the*

bank, and prays a discovery, and that said transfer be set aside, and that they may be declared to hold in trust, for complainants and creditors of the bank, whatever they received in exchange for the stock thus fraudulently transferred; that the stockholders named be made defendants, "and show, if they can, why complainants should "not have the relief therein prayed," and answer under oath the interrogatories therein propounded. The bill as amended further prays, "that an account be taken of "the amount *due your orator and the other judgment "creditors of said bank, who have been made parties to this "proceeding, by interpleader or otherwise*, and that your "orator's said judgment be decreed to be a first lien upon "all the moneys, property and effects of the said bank "discovered by this proceeding," etc.

"That a full, complete and accurate account be taken of "all the sales, transfers or surrenders, or pretended sales, "transfers, etc., of stock, made by the said stockholders "of the said bank, or any of them, after the same sus- "pended payment, in the manner as aforesaid, and of the "amounts received by them, respectively, for any such "sales, transfers, etc., and that they may be decreed to "hold the same in trust for the creditors of said bank, in "the manner as hereinbefore prayed, and that upon such "accounts being taken, the said defendants, or such of "them as shall be found liable to your orator, and the "judgment and other creditors of the said bank, upon the "said stock liability created by the said act, and such of "them as shall be liable for the amounts received by them "for the sales and transfers of stock so made by them in "the manner aforesaid, be decreed to pay whatever "amounts shall be found to be due from them and each "of them, respectively, into court, or to the receiver duly

"appointed by said court, and that out of the fund so cre-
"ated, your orator's judgment be paid in full, and the bal-
"ance thereof be distributed among the other creditors
"of said bank, in such a way and manner as your Honors
"shall direct.

"That the said defendants, and each of them, be en-
"joined and restrained from in any way or manner selling
"or disposing of said shares of stock of the said bank
"now held by them, or the certificates representing the
"same."

The amended bill, in form and substance, is a creditor's bill, pure and simple, and the complainant seeks to reach by it two species of property as assets of the bank not mentioned or referred to in the original bill, viz.: property of the bank, which certain of the stockholders received in exchange for stock fraudulently transferred by them to Holmes, and second, the amount due under the statutory obligation the stockholders assumed in becoming stockholders to pay the debts of the bank to the amount of their stock, in addition to the amount they had invested therein. A receiver had been appointed, and had then taken possession of the property and assets of the bank, and the prayer of the amended bill is that both species of property be paid "into court,
"or to the receiver duly appointed by the said court,
"and that out of the funds so created your orator's
"judgment be paid in full, and the balance thereof be dis-
"tributed among the other creditors of said bank in such
"a way and manner as your Honors shall direct." In respect to the first species, namely, moneys and assets of the bank which stockholders had received for stock fraudulently transferred and assigned to Holmes, the amendment was properly made, for property of the bank re-

ceived in exchange for stock fraudulently transferred, in equity continued to be the property of the bank, and upon the setting aside of such transfers could be appropriated to the payment of the debts of the bank. A proceeding by creditor's bill was an appropriate proceeding for accomplishing this object. In such a proceeding, the claim of the creditor filing the bill will be first paid. In like manner the second species of property, namely, the statutory liability of stockholders for the debts of the bank could have been reached by an amendment of the bill if it constituted a portion of the assets of the bank. Manifestly the solicitor, when he drew the amended bill, supposed that this liability was a liability or duty which the stockholders owed to the bank, and constituted a portion of its assets, for he asks that it be enforced by a decree of the court, and the amount so found due be paid into court, or to the receiver appointed by the court, together with the property of the bank received in exchange for stock fraudulently transferred, and that "out of the fund so "created" complainants' judgment be paid in full, "and "the balance distributed among the other creditors of said "bank, in such manner as your Honors shall direct." This clause was not inserted for the purpose of saving the rights of the general creditors; for the court finding itself in possession of a fund derived from the assets of the bank, would of its own motion, and in the absence of such a prayer, have called parties in to establish their respective claims to it, and have distributed it to the parties entitled to it. It would have been given, first to the petitioning judgment creditors, and then to such creditors as had prosecuted their claims against the bank to judgment, for until they had put their claims in judgment and issued executions, and had them returned *nulla bona*, they could

not avail themselves of a proceeding in equity against the debtor.

At the hearing in the court below, it was urged in behalf of these stockholders that their statutory liability was not a liability to the bank, but to the creditors of the bank; that the complainant in this proceeding could only reach the assets of the bank, and that this statutory liability, though treated as such in the amended bill, was in no sense an asset of the bank. This position is undoubtedly correct. The liability of stockholders to the creditors of the bank is a collateral statutory obligation of the stockholders for the benefit of creditors, by which the former become sureties for the debts of the corporation.

Hicks v. *Burns*, 38 N. H., 145.

It is well settled that the liability of a stockholder, created by the general statute of incorporation, is not an asset of the corporation.

Jacobson v. *Allen*, 12 Fed. Rep., 455.
Story v. *Furman*, 25 N. Y., 215.
Dutcher, Assignee in Bankruptcy, v. *National Bank*, 12 Blatch., 425.
Bristol, Assignee in Bankruptcy, v. *Sanford*, 12 Blatchford.

In the case of *Jackson* v. *Allen*, 12 Fed. Rep., 455; Judge WALLACE says: "It still remains for the complainant to maintain that it is property or assets of the "corporation, and passes to him by virtue of his appointment as receiver. No case is cited to support this contention.

"The receiver of an insolvent corporation makes his "title through his corporation. He can not, through his

"appointment, acquire that which the corporation never "had. He represents the creditors of the corporation in "the administration of his trusts, but his trust relates only "to the corporate assets. * * * He is not a trustee "for creditors in relation to assets which belong to them "individually, or as a body."

Bristol v. *Sanford*, 12 Blatchf., 341.
Curtis v. *Leavitt*, 15 N. Y., 44.

* * * * * *

"Neither a receiver, an assignee under a voluntary as- "signment for the benefit of creditors, as well as the "insolvent, acquires any right to enforce a collateral obli- "gation given a creditor by a third person, for the pay- "ment of the debt of the insolvent."

So in *Story* v. *Furman*, 25 N. Y., 214, it is held that whether this liability be designated as a "statutory liability" or a "collateral statutory liability" or a "statutory penalty," it was not created for the benefit of the bank, could not be collected, sold or released by the bank, was in no respect under its control; but on the other hand belongs to the creditors solely, and is under their control.

It was further urged in behalf of these stockholders that their liability for any sum beyond the amount invested by them in the capital stock of the bank was a creature of the statute, and that the remedy for enforcing it must be found in the statute creating the liability. That the remedy thus provided could only be exercised in cases where a bank had failed to redeem its circulating notes. That if there was any remedy outside of the statute, it was in the form of an action at law.

The Supreme court say in *Pollard* v. *Bradley*, 20 Wal-

lace, 520: "The individual liability of stockholders in a "corporation for the payment of its debts, is always a "creature of statute. At common law it does not exist. "The statute which creates it, may also declare the pur- "pose of its creation, and provide for the manner of its "enforcement." * * * "The liability and the "remedy being created by the same statute, the remedy "created is exclusive of all others. A general liability "created by statute without a remedy may be enforced "by an appropriate common law action. But where the "provision for the liability is coupled with a provision "for a special remedy, that remedy and that alone must "be employed."

To meet these objections the complainants brought forward the amendatory act of 1876, passed nearly a year after the bill was filed, the second section of which reads as follows:

"That when any national banking association shall "have gone into liquidation under the provisions of sec- "tion 5220 of said statutes, the individual liability of the "shareholders provided for by section 5151 of said stat- "utes, may be enforced by any creditor of such associa- "tion, by bill in equity, in the nature of a creditor's bill, "brought by such creditor on behalf of himself and of "all other creditors of the association, against the share- "holders thereof, in any court of the United States "having original jurisdiction in equity for the district in "which such association may have been located or estab- "lished."

As the amended bill was filed shortly after this amendment of the statute, counsel for complainant asked that this amended bill be treated as authorized by this section, and as having been filed under and in pursuance of it.

A statute giving a remedy in equity must be considered as having been passed in view of the established rules governing proceedings in equity, and the remedy should be administered in conformity with these rules. The language of the statute is, such liability "may be enforced "by any creditor of such association by bill in equity *in* "*the nature* of a creditor's bill, brought by such creditor "on behalf of himself and of all other creditors of the "association against the shareholders thereof."

The provision is not that this liability may be enforced by a simple creditor's bill, but "by a bill in the *nature* of "a creditor's bill," that is a bill having some of the qualities that liken it to, but not all the qualities that make it, a creditor's bill. A bill filed by a creditor to reach property held in trust for all the creditors, is a bill in the nature of a creditor's bill. It is distinguished from a creditor's bill by the fact that the party filing it need not be a judgment creditor. The bill must be filed by a creditor, not on his own behalf alone against the association to reach its assets, but "by a creditor on behalf of himself, "and of all other creditors of the association against the "shareholders thereof," to enforce this statutory liability.

When there are numerous parties standing in the same situation as to their rights or claims, and it is necessary to have them all before the court before their rights can be determined in a judicial proceeding, and they are too numerous to be made complainants by name, any one of the parties is permitted to file a bill in behalf of all, and then all are in a sense before the court.

Adams' Equity, 515, side page 258.

See Jones Pleading in Equity 105-6, and cases cited.

"The general rule," says Story in his Equity Plead., Sec. 76a, "in courts of equity, as to parties, is as has "already been stated, that all persons materially interested "in the subject matter ought to be made parties to the "suit, either as plaintiffs or as defendants, however nu- "merous they may be, in order not only that complete "justice may be done, and that multiplicity of suits may "be prevented, or, as the rule was once stated by Lord "Hardwicke, that all persons ought to be made parties be- "fore the court who are necessary to make the determina- "tion complete and to quiet the question." In considering the exceptions to this general rule the same author says, Section 99: "Similar reasons have induced the court to de- "part from the general rule in another class of cases when "the suit is brought on behalf of many persons in the "same interest, and all the persons answering that de- "scription cannot easily be discovered or ascertained." This amendatory statute was manifestly framed in view of this exception to the general rule, and the remedy it gives must be administered under and in accordance with established rules of procedure applicable to cases within the exception.

It is said in Story's Equity Pleading, Sec. 99: "A few "creditors will not be permitted to bring a bill of this "sort for an account and administration of assets, without "saying in the bill that it is brought on behalf of them- "selves and all the rest of the creditors."

The same author says, Section 126: "In all these "classes of cases it is apparent that all the parties stand "or are supposed to stand in the same situation and have "one common right or one common interest, the opera- "tion and protection of which will be for the common

"benefit of all, and cannot be to the injury of any. It is "under such circumstances and with such objects that the "bill is permitted to be filed by a few on behalf of them- "selves and all others, or against a few, and yet to bind "the rights and interests of the others. But if the bill is "filed by the plaintiffs on behalf of themselves only, and "not on behalf of all other persons in interest, the bill "would be unmaintainable and be bad on demurrer. "When it appears on the face of the bill that there will "be a deficiency of the fund and that there are other cred- "itors or legatees who are entitled to a ratable proportion "with the complainants, such creditors or legatees should "be made parties to the bill, or the suit should be brought "by the complainants on behalf of themselves and all "others standing in a similar relation, *and it should be so "stated in the bill.*"

Egbert v. *Woods*, 3 Paige, 520.
Fish v. *Hezeland*, 1st Paige, 20.
Brown v. *Rickets*, 3rd John. Ch., 555.
Walker v. *Devereaux*, 4 Paige, 229.
Joy v. *Worthy*, 1st Wash., C. C., 417.

In the case of *Whitney* v. *Mayo*, 15 Ill., 252, the bill was filed by one of a class in his own behalf. Court say. at page 255: "The case before us falls within the excep- "tion to the general rule on account of the number, and "part being unknown, which may excuse their being "made parties by name. But the bill has not been framed "within the exception. It should have been filed for and "on behalf of all the other communicant members, or "some ground should be shown why they could not be "made complainants in this way." And the court affirmed the decree below dismissing the bill.

It is said in 1 Daniels Ch. Pr., 245:

"In all cases where one or a few individuals of a large "number institute a suit in behalf of themselves and the "others, they must so describe themselves in the bill, "otherwise a demurrer or plea of want of parties will "lie."

To the same effect is *Harper* v. *Union Manf. Co.*, 100 Ill., 225.

The statute directs expressly how the bill to enforce this liability shall be framed. It says it shall be a bill in the nature of a creditor's bill, "brought by such creditor "on behalf of himself and of all other creditors of the "association."

The rule is inflexible and without any exception, that a remedy provided by statute must be strictly pursued.

1 Parsons on Contracts, 143.
Stedman v. *Eveleth*, 6 Met., 114.
Knowlton v. *Ackley*, 8 Cush., 93.
Gray v. *Coffin*, 9 Cush., 199.
Chase v. *Lord*, 77 N. Y., 1.
Howard v. *Wilcox*, 47 Pa. St., 57.
Pollard v. *Bailey*, 20 Wall., 520.
Thompson's Liability of Stockholders, 520.

It is clear that the amended bill could not be treated as filed under this amendatory statute.

II.

The second section of the act of 1876 furnished a remedy to the creditors as a class, by a proceeding in chancery to be instituted by one creditor as a representative of the class, and in behalf of all composing it, against all the stockholders. A bill filed by one creditor in his own behalf before the act was passed, not against the stockholders, but against the bank and its officers, to discover and appropriate the assets of the bank to the payment of his judgment, cannot by amendment be changed into a proceeding of this character. The proceeding must be by original bill framed as directed in the act which authorizes it; and the amended bill should as to the stockholders, have been dismissed at the hearing.

The only parties in a bill filed under this statute are the creditors of the bank on one side and the stockholders on the other, and the only question involved is the amount each stockholder is required to pay, and to whom or the persons in whose behalf he is to pay it. This claim in behalf of the creditors of the bank against its stockholders constitutes the subject matter of a new bill, separate and apart from the subject matter of the original bill, and cannot be brought into the suit by way of amending the original bill.

In *Shields* v. *Barrow*, 17 Howard, 144, the Supreme court say:

"Under the privilege of amending, a party is not to be "permitted to make a new bill. Amendments can only "be allowed when the bill is found defective in proper "parties, in its prayer for relief, or in the omission or

" mistake of some fact or circumstance connected with " the substance of the case, but not forming the substance " itself, or for putting in issue new matter to meet allega- " tions in the answer."

" There is no authority that goes so far as to authorize " a party who has no cause of action at the time of filing " his original bill, to file a supplemental bill in order ot " maintain his suit upon a cause of action that accrued " after the original bill was filed; even though it arose out " of the same transaction that was the subject of the " original bill."

Pinch v. *Anthony*, 10 Allen, 477.
Milner v. *Milner*, 2 Edw. Ch., 114.
Pilkinton v. *Wegnall*, 2 Mad., 240, 244.
Prichard v. *Draper*, 1 R. & M., 191.

Matter accruing since the bill was filed and which constitutes the basis of a new proceeding, cannot be incorporated into the original bill by amendment. The proper course for complainant to pursue is to bring a new suit. It is only when a suit shall become defective from an event happening after the filing of the bill, that a supplemental bill can be filed under No. 57 of Supreme court rules.

Mason's Admrs. v. *R. R. Co.*, 10 Fed. Rep., 334.

The chancellor in *Verplank* v. *Mercantile Ins. Co.*, 1 Ed. Ch. Rep., says:

" In considering this question, it is necessary to distin- " guish between an amendment and matter which would " constitute a new bill; for under the privilege of amend- " ing, the party is not to be permitted to make a new " bill."

To the same effect are Story Equity Pleading, 884.

Crabs' Administrator v. *Thomas*, 25 Ala., 212.

Lambert v. *Jones*, P. & H. Rep., 144.

Conroy v. *Smith*, 11 Geo., 539.

Fenno v. *Coulton*, 14 Ark., 15.

Williams v. *Starke*, 2 B. Mon., 190.

Pratt v. *Squire*, 5 Cush., 551.

Ryan v. *Talmage*, 1 John. Ch., 184.

Belknap v. *Stone*, 1 Allen, 572.

We might go on indefinitely citing authorities to the same effect. Of course, the rules governing proceedings in chancery are general rules, and they cannot be changed at the discretion of the chancellor to meet special cases. He must obey the law laid down for his guidance in administering relief. A party who goes into a court of chancery for relief, must do so in conformity to the rules governing that mode of procedure. This court says, in *Farni* v. *Tesson*, 1 Black, 315:

"It is no wrong or hardship to suitors who come to "the courts for a remedy, to be required to do it in the "mode established by law."

This remedy against the stockholders the complainant could not have availed himself of when the bill of complaint was filed. It was afforded him by the amendatory act of 1876, passed nearly a year after the bill was filed; it cannot, therefore, be enforced in the original suit, but a new suit must be brought under the statute providing this relief.

Sanborn v. *Sanborn*, 7 Gray, 42.

Story's Equity Jurisprudence, § 885.

Cooper's Equity Pleading, 332, 333.

The complainant was vested with the right to enforce the liability of the stockholders, by this proceeding in equity, by the statute of 1876. This was long after the bill was filed. It was this statute that gave him a cause of action in equity against these stockholders. He cannot set up this cause of action in the original suit, even by a supplemental bill. A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff should dismiss his original bill and file an entirely new one.

Milner v. *Milner*, 2 Edw. Ch., 114.

In *Pinch* v. *Anthony*, 10 Allen, 477, the court say:

"We have found no authority that goes so far as to au-
"thorize a party who has no cause of action at the time
"of filing his original bill, to file a supplemental bill in or-
"der to maintain his suit upon a cause of action that
"accrued after the original bill was filed, even though it
"arose out of the same transaction that was the subject
"of the original bill."

A plaintiff cannot support a bad title by acquiring another after the filing of the original bill, and then bringing it forward by supplemental bill.

Pilkinton v. *Wignall*, 2 Mad., 240, 244.
Pritchard v. *Draper*, 1 R. & M., 191.

Matter accruing since the bill was filed, and which constitutes the basis of a new proceeding, cannot be incorporated into the original bill by amendment, nor introduced in a supplemental bill. The proper course for complainant to pursue is to bring a new suit.

Mason's Administrator v. *R. R. Co.*, 10 Fed. Rep., 334.

In *Hurd* v. *Everett*, 1 Paige Ch. Rep., 124, the chancellor says:

"The amendments to a bill, when allowed, are always "considered as incorporated in and as forming a part of "the original bill. They have reference to the time of "filing the bill, and the defendant cannot, by any amend-"ment, be called upon to answer anything which has "occurred since that time."

See Daniels' Ch. Prac., 402, and cases cited in the note.

The bill and amended bill must, therefore, be treated as an entirety, and as together constituting one record.

From the statement that the amended bill must be regarded and treated as a portion of the original bill it follows that only such facts as existed at the time the bill was filed can be introduced into it by way of amendment.

III.

We will suppose that this amendatory statute had already been passed when the original bill was filed, and that a bill had then been filed embodying all the allegations and prayers of the original and amended bills. It would then have been a bill to discover and reach the assets of the bank and enforce the liability of stockholders to the creditors of the bank, with a prayer that "the fund "thus created" — that is, the "fund" derived from both these sources be distributed to the creditors of the bank. As the claim against the shareholders is essentially separate and distinct from the claim as made in the bill against the bank, and involves matters in no way connected with the proceeding against the bank, to be supported by dif-

ferent proof, and requiring a separate and distinct decree, the bill would be obnoxious to another and fatal objection, namely, that the two claims cannot be united in the same bill. The bill would be clearly within the meaning of multifariousess as defined by Story.

In his Equity Pleadings, Section 271, he says: "By "multifariousness is meant the improperly joining in one "bill distinct and independent matters, and thereby con- "founding them, as, for example, the uniting in one bill of "several matters of a distinct and separate nature, against "several defendants in the same bill."

A bill is clearly multifarious when it seeks to enforce different demands against persons liable respectively, but not as connected with each other.

Sexton v. *Davis*, 18 Ves., 80.

The Supreme court, in *Walker* v. *Powers*, 104 U. S. Rep., 245, held that, "when a bill, in respect to a portion "of the property sought to be reached, involves totally "distinct questions, requiring different evidence and lead- "ing to different decrees, it is multifarious, and cannot be "entertained." And the court, in their opinion, by Mr. Justice MILLER, cite with approval, the case of *Sawyer* v. *Noble*, 55 Me., where a bill was held to be multifarious which was filed by one partner against his co-partner, and a purchaser from him, for a settlement of the affairs of the firm, and a rescission of a fraudulent sale, for the reason that it involved separate and unconnected matters, which could only be determined in separate suits.

In 1 Daniels' Ch. Prac., page 335, it is said: "It may "be that the plaintiffs and defendants were parties to the "whole transaction which formed the subject of the suit,

"nevertheless, those transactions may be so dissimilar, "that the court will not allow them to be joined together, "but will require distinct records."

"A bill filed by the assignee of an insolvent debtor, "prayed the aid and direction of the court, in relation to "conflicting claims of creditors, and the order in which "they should be paid, and also prayed for relief against "the debtors of the assignor, and sought to enforce pay- "ment from them. Held, that as the two branches of the "bill were founded on distinct rights, they were mis- "joined in one suit."

Dimmock v. *Bixby*, 20 Pick, 368 (1838).

"A claim against the directors of a manufacturing com- "pany, under Rev. Stat., C. 38, on the ground that its "debts exceed its capital stock, cannot be joined in one "bill in equity, with a claim against its stockholders under "the same chapter, on the ground that the capital stock "was not duly paid in and certified."

Cambridge Water Works v. *Somerville Dyeing and Bleaching Co.*, 14 Gray, 193 (1859).

"A claim against the officers of a corporation under "Stat., 1862, C. 218, on the ground that they did not file "the certificate required by the Statute of 1862, C. 278, "and also upon the ground that they signed the certificate "required by Gen. Stat., C. 61, § 8, knowing it to be false, "cannot be joined in one bill in equity, with a claim "against the stockholders, upon the ground that the capi- "tal stock was never fully paid in."

Pope v. *Leonard*, 115 Mass., 286 (1874).

The object of the action may be the same, viz. the

collection of a debt; but where the liability and grounds of it are entirely distinct, they constitute separate causes of action, which cannot be united in the same suit.

~~Arles v. Lansdon. Conning v. McCulloch,~~ 64 N. Y., 173.

IV.

LIMITATIONS.

The following is section 15 of the statute of Illinois entitled "Limitations," in force when this right of action accrued, and which is still in force: "Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury to property "real or personal, or to recover the possession of personal "property or damages for the detention or conversion "thereof, and all civil actions not otherwise provided for, "shall be commenced within five years next after the "cause of action accrued."

The statutory liability of stockholders for the debts of the corporation arises from their acceptance of the act creating the corporation, and their implied promise to fulfill its engagements. The proper remedy at law is an action upon the case. When the statute bars such an action at law it is also a good defense in equity.

Carroll v. *Green*, 92 U. S., 510.

Wood in his treatise on limitations of actions, page 5, says: "Statutes of limitations of actions were formerly re- "garded with little favor, and the courts devised numerous "theories and expedients for their evasion, but lately they "are regarded as beneficial and resting on principles of "sound public policy, and are not to be evaded except by "the methods provided therein."

They are declared by LIVINGSTON, Justice, in *Fisher* v. *Handen*, 1 Paine, U. S. C. C., 61, "among the most ben-"eficial to be found in our books."

This court in *McCluny* v. *Silliman*, 3 Pet., 278, says: "Of late years the courts in England, and in this country, "have considered statutes of limitations more favorably "than formerly. They rest upon policy, and tend to the "peace and welfare of society. The courts do not now, "unless compelled by the force of former decisions, give a "strained construction to evade the effects of those statutes. "By requiring those who complain of injuries to seek re-"dress by action at law, within a reasonable time, a salu-"tary vigilance is imposed, and an end is put to litigation."

~~Sawyer v. Hartford Ins. Co. 13 Wal. 158.~~

The general rule is that whatever the courts may think the legislature would have done if it had forseen a particular contingency, nevertheless a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation unless it also comes fairly within the exceptions named therein. In other words, the legislature makes the law and the courts apply it, and they cannot extend it to the cases, to which it does not apply, or except from its operation cases coming clearly within its provisions, and not excepted from its operation.

Wood on Limitations, pages 9, 10.

A court of equity will give effect to the statute in all cases when the plaintiff could have brought an action at law for the same matter.

Godden v. *Kimmel*, 99 U. S., 201.
Mann v. *Fairchild*, 2 Keys (N. Y.), 106.
Roosvelt v. *Mark*, 6 John. Ch., 266.

Clark v. *Ford*, 3 Keys (N. Y.), 370.
Stafford v. *Bryan*, 3 Wend., 532.
McCrea v. *Purmort*, 16 Wend., 460.
Spoor v. *Wells*, 3 Barb. Ch., 199.
Sherwood v. *Sutton*, 5 Mass., 143.
Pratt v. *Northam*, 5 Mass., 95.
Hunt v. *Wickliff*, 2 Pet., 201.

In *Sugar River Bank* v. *Fairbanks*, 49 N. H., 139, BELLOWS, C. J., in commenting upon the extent to which a court of equity will go, in enforcing statutes of limitations, says: "As a general rule, courts of equity are "bound by a statute of limitations equally with courts of "law, and they cannot disregard the plain requirements "of such statute, for that would be to repeal it, even "where the statute in terms applies only to actions at law "which are enumerated, courts of equity act in analogy "to it and refuse to grant relief in cases coming within its "provisions."

Courts of equity are no more exempt from these statutes than courts of law. *Bank of U. S.* v. *Daniels*, 12 Pet., 56. "Whenever," says Sir Thomas Plummer, in *Cholmondely* v. *Clinton*, 2 Mer. Ch., 173, "any statute "has fixed periods of limitation by which the claim, if it "had been made by a court of law, would have been "barred, the claim has been by analogy confined to the "same period in a court of equity."

If the matter in controversy in a court of chancery is of a purely equitable nature, not cognizable in a court of law, the statute of limitations has no application, but the court will apply the doctrine of neglect according to discretion, regulated by precedents and the peculiar circumstances; but when the two courts have concurrent

jurisdiction, and also when the aid of equity is invoked on account of special circumstances, such as the need of discovery, the difficulty of proceeding at law, or the like, the statute is as effectual a bar as at law, with the qualification that in cases of fraud it commences running from the time of the discovery of the fraud.

Lawrence v. *Trustees*, 2 Denio, 577.

In all cases of concurrent jurisdiction at law or in equity, statutes of limitation seem obligatory in each court, and courts of equity do not act so much in analogy to the statutes as in obediance to them.

2 Story's Eq. Jur., § 1,520.

Chancery has adopted limitations at law as a general rule of decision.

Breckenridge v. *Churchill*, 3 Marsh (J. J.), 15.

Frame v. *Kenney*, 2 Marsh (A. K.), 145.

McDowell v. *Heath*, 3 Marsh (A. K.), 223.

Thompson v. *Blair*, 3 Murphy, 583.

Mere doubt as to the right or difficulty in the way of its assertion will not affect the running of the statute of limitations apart from the disabilities expressed in the statute itself. There must, in order to prevent its operation, be some insuperable barrier or some certain and well-defined exception established by judicial authority.

Weaver v. *Lexman*, 52 Md. Rep., 708.

The principle upon which statutes of limitation are founded makes neglect to sue conclusive evidence of the abandonment of the cause of action.

109 U. S. Rep., 404.

The statute begins to run from the date when the liability of the stockholder becomes fixed in the sense that the creditor may without obstruction proceed against him.

Thompson on Liability of Stockholders, Sec. 290.

Carroll v. *Green*, 92 U. S., 92.

A person cannot be said to have made his claim the subject of an action against a stockholder of the bank until he shall have commenced an action at law, or have instituted a proceeding in equity against such stockholder to enforce the payment of it; nor can he avail himself of a proceeding which is being prosecuted by another creditor, until in some authorized mode he shall have made himself a party to such proceeding, and adopted it as his own. A party can never be said to act by another person unless he has authorized such person to act for him, or adopted the act of such person as his own act.

The only claim of which payment is demanded in the original bill, is the judgment which the complainant in that bill had recovered against the bank. Subsequently two other creditors filed their petitions, setting forth a recovery of judgments by them against the bank the issuing and return of executions *nulla bona* and praying to be made parties complainants in the suit. They were accordingly, by the order of the court, made co-complainants with the complainant in the suit. This was an adoption by them of the pending suit, and entitled them to have the relief prayed for in that suit extended to and include their judgments. It is alleged in the bill that the assets of the bank were more than sufficient to pay the debts of the bank.

The object of the bill is to discover these assets and

have them, or such portion of them as might be necessary, appropriated by the action of the court to the payment of complainant's judgment. The court, through a receiver appointed under the prayer of the bill, took possession of the books, property and assets of the bank. After some of these assets had been disposed of by the receiver, the complainant, in October, 1870, filed an amended bill, making the stockholders of the bank defendants. The allegations of this amended bill are that some of these stockholders (naming them), had fraudulently sold their stock to Ira Holmes, president of the bank, receiving in exchange therefor money and assets of the bank, and the prayer of the bill is that these sales be set aside and that the stockholders who made them be subjected to their statutory liability to the same extent as though said sales had not been made, and that they be decreed to hold the moneys, property and effects received by them for said stock in the manner aforesaid, in trust for the creditors of said bank; and upon the respective amounts being ascertained, they be decreed to pay the same to the creditors thereof, or to the receiver thereof, or to such person or persons as your Honors shall order and direct.

The bill prays "that an account be taken of the amount "due your orator and the other judgment creditors of the "said defendant bank *who have been made* parties to this "proceeding by interpleader or otherwise; and that your "orator's said judgment be decreed to be a first lien "upon all the moneys, property and effects of the said "bank."

The object of the amended bill was, therefore, to reach the assets of the bank, treating the amount due from

stockholders under their statutory obligation as a part of these assets, and have the same appropriated by the action of the court to the payment of complainant's judgment in full. In other words, it was a proceeding by complainant to enforce the payment of his own judgment, and not to enforce payment of the claims of the general creditors of the bank by its stockholders. It could not, therefore, have the effect of suspending the operation of the statute of limitations upon the claims of the general creditors. On the 23d of July, 1883, under a decretal order of that date, said amended bill was further amended "so as to show that the same is filed in behalf of said "complainants and all the other creditors of said bank, "and the prayer of said bill is also amended to correspond "with said amendment, and the defendants have leave to "answer." The interlocutory decree then entered was fashioned upon the bill as thus amended, and the cause was referred to "take proof" of the amount due each creditor of the bank, etc.

The answer of the stockholders, including appellant, was promptly filed to the bill as thus amended, setting up and insisting upon the statute of limitations as a bar to the prosecution of the claims by or in behalf of the other creditors, and this objection was duly made to these claims as proof of them was offered before the master. This is the first opportunity the defendant stockholders had to make any answer to the claims of the other creditors of the bank, the very first time they were in a position to contest them. No replication was filed to this amended answer.

Where a new cause of action is brought into the case by amendment of the bill or declaration, the amendment

does not take effect by relation from the time of filing the bill or declaration so as to prevent the operation of the statute, but the statute continues to run in respect to such new cause to the time of the amendment.

Allen v. *Link*, 5 Lea (Tenn.), 454.

Where by an amendment a new charge is introduced against the defendant, he may make such defense to it as if it were the foundation of an action then newly begun.

3 Ired. Eq., 535.

If new parties are made by amending a bill in equity the statute of limitations does not cease to run in their favor until they are thus made parties.

Heirs, &c. v. *M'Intyre*, 6 Peters, 61.

If an amended bill set up a new title the statute of limitations runs against that title till the filing of the amended bill.

Holmes v. *Trout*, 7 Peters, 171.

If a party amends his declaration in ejectment by inserting a new count; laying a demise from a different lessor, the statute of limitations as against this new title continues to run till the amendment is made. And if the adverse possession had been held more than twelve years, and more than ten years since the death of plaintiff's ancestor, it is a bar.

Second v. *Davies*, 6 Peters, 124.

To the same effect are:

R. R. Co. v. *Cobb*, 64 Maine, 143.
Phelps v. *R. R. Co.*, 74 Maine, 548.
Woodward v. *Ware*, 37 Maine, 563.
Gorman v. *Judge*, 27 Mich., 138.

In the above case of *Gorman* v. *Judge*, the court, at page 141, say: "It is clear enough that the only purpose "and object of allowing the amended declaration, instead "of putting the plaintiffs to a new action, after they had "submitted to a nonsuit, was to prevent the statute bar "of the action. We do not think the statute can be "evaded by any such necromancy; and to permit the shal-"low fiction of a relation back to the commencement of "the suit, under such circumstances, to nullify an act of "the legislature, would be discreditable to the judiciary. "See *Wright* v. *Hart*, 44 Penn. St., 454; *Trego* v. "*Lewis*, 58 Penn. St., 463; *Williams* v. *Randon*, 10 Texas, "74; *Wilbanks* v. *Willis*, 2 Rich. (S. Ca.) 109, 42 N. H., "70. We are aware there are some cases the other way "based upon early decisions made when the statute of "limitations was looked upon as a hard and unconscion-"able defense. But we can recognize no sound principle "upon which such decisions can rest. Statutes of limita-"tions are now quite generally looked upon as statutes "of repose, and just as essential to the general welfare "and the wholesome administration of justice as statutes "upon any other subject, and to be construed with the "same favor to effect the legislative intent."

In *Busby* v. *Seymour*, 1 Jones & Tourche, 527, a bill was filed by a creditor against an executor, who was also heir at law of the decedent, to reach personal estate. It appeared from the master's report that the personal estate had been exhausted in paying judgments. A supplemental bill was then filed by complainant in behalf of himself and all other creditors, praying to have the benefit of the former suit, and that complainant and all other simple contract creditors might be subrogated to the place of the judgment creditors whose debts were paid out of the per-

sonal estate, and for relief against the real estate of the decedent. The original bill prayed relief against real estate, but was not filed in behalf of all the creditors. The supplemental bill was not filed until after the statute had barred claims against real estate. The supplemental bill, so far as it sought relief against real estate, was dismissed. SUGDEN, Lord Chancellor, at page 533, says:

"In May, 1834, it appeared that there was a deficiency "in the personal assets of the executor to answer the "demands upon them. Nevertheless, the party proceeded "in the cause without altering the nature of his suit *on* "*the notion that by force of his suit he had obtained a* "*priority over the other creditors* of the executor, and "upon that view of the law he chose his remedy, such as "he was entitled to, and then found he was mistaken in "point of law; and by a new bill filed in 1844, the present "plaintiff, who stands in the place of the former plaintiff, "asks, for the first time, for a decree to marshal the "assets, * * * but the court cannot permit this "to be done. *This is a new suit, bringing new parties* "*before the court and seeking new relief.* Consider the "consequences of the mode in which the suit has been "heretofore conducted. The personal representative of "the executor happened to be also his real representative. "If the real and personal representatives had been dis- "tinct persons, it is clear that the original bill of 1823 "would have been dismissed as against the heir at law; "and the decree would have been for an account of the "personal assets only, there being no case made for a "decree against the real estate. It was only because the "same person happened to be the real and personal rep- "resentative that that course was not followed. But I "must treat this case as if that course had been followed.

"Then the heir at law is allowed to remain in possession "of the estate; * * * and after a lapse of twenty "years I am asked, on the doctrine of *lis pendens*, to "charge the persons who have obtained interests in the "estates for value."

Referring to *May* v. *Selby*, 1 Y., &c., C. E., 235, the court further says: "That case is conclusive to show that "in point of law, the original bill here was not framed so "as to affect the real estate; it was not on behalf of all "the creditors, and it did not bring the proper parties "before the court."

As we have already said the proceeding as it stood at the time of the amendment, in July, 1883, was a proceeding in behalf of complainants alone by ordinary creditors' bill against the bank and these stockholders to discover assets of the bank, and have the same, together with what was due from these stockholders under their statutory liability, upon the theory that it was an asset of the bank, appropriated to the payment of plaintiff's judgment, together with the judgments of such of the creditors as had at that time made themselves parties to the proceeding by petition or otherwise. The plaintiff and these judgment creditors had entire charge and control of the case, and could have dismissed it without in any degree affecting the rights of any of the other creditors of the bank, or giving them any just cause of complaint.

The other creditors were not then before the court in any sense whatever. The bill was then amended "so as "to show," as stated in the decretal order allowing it, "that the bill is filed in behalf of said complainant and "all the other creditors of said bank, and the prayer of

"the amended bill is also amended so as to correspond "with said amendment."

It required an amendment of the bill and of the prayer of the bill to make it embrace the claims of other creditors; consequently by this amendment these claims were then brought before the court for the first time, and the proceeding enlarged to a proceeding to enforce their payment. Up to this time, the statute had been running against them, and they were then barred.

Even if the bill had been filed in behalf of the complainant and the other creditors of the bank who should come in, &c., the statute already running against the claims of these other creditors would continue to run against them until they should come in with their claims by petition to be made parties, or present them to the master to be proved up under the decree: "Until then, "it is the suit of the actual plaintiff alone. He has the "right to dismiss or compromise it. * * * When a decree "has been made, the case is different. * * * The whole "body of creditors for whose benefit the decree is made "become entitled to intervene."

Adams' Equity, 515, side page 585.

If a bill is brought in behalf of the plaintiff, and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff has the control of the suit for himself alone, and in order to maintain his bill he must show that he is himself entitled to equitable relief.

Hubbell v. *Warren*, 8 Allen, 173.

In suits by one creditor in behalf of himself and the others for administration of the estate of a deceased

debtor, the defendant may at any time before decree have the decree dismissed on payment of plaintiff's debt and costs.

1 Daniels' Ch. Prac., 235-236.

Where a decree *has been made* upon a bill brought by a creditor on behalf of himself and all other creditors, and another comes in to take the benefit of the decree and proves his debt, and then files a bill on behalf of himself and all other creditors, the defendant may plead the pendency of the prior suit; for a person coming in under a decree is *quasi* a party.

1 Daniels' Ch. Prac., 635.
Neve v. *Weston*, 3 Atk., 557.

When a decree has been obtained for the payment of creditors it is in the nature of a judgment for all. It then becomes the judgment of all, and they have a right to insist upon its execution.

The pendency of a suit by one creditor for an account, if the suit has not been prosecuted to a decree, is no bar to a proceeding instituted by another creditor for an account.

Roger v. *King*, 8 Paige, 209.

The following is the syllabus of the case of *Innes* v. *Lansing*, 7 Paige, 583.

"Where a creditor files a bill in behalf of himself and "all others, who shall come in and prove their debts un- "der the decree and contribute to the expenses of the "suit, he may discontinue his suit at any time before "there has been a decree therein for the benefit of him- "self and the other creditors. And the defendant, at any "time before such decree, has the right to have the bill

"dismissed, upon paying what is due to the complain-
"ant, with interest and costs. The filing of a bill by one
"creditor, in behalf of himself and others, will not prevent
"another creditor from filing a similar bill, *previous to a*
"*decree* in the first suit. But as soon as a decree is ob-
"tained in either suit, for the benefit of all the creditors,
"the proceedings in all other suits may be stayed, if no
"other relief can be obtained in such other suits than
"could be had under the decree already made."

It is therefore the decree in their behalf which invests the general creditors with a beneficial interest in the proceeding, and until they take some active step by petition or coming in under the decree to prove their claims, they cannot be said to have instituted an action or judicial proceeding to enforce their payment, and if they are then barred by the statute of limitations their remedy against the stockholders is effectually barred.

In *Sterndale* v. *Hankinson*, 1 Simons, 394, cited in behalf of complainants, in the court below, and followed by the learned judge, who heard and decided this case, it was determined that when a bill is filed by a creditor, *in behalf of himself and all other creditors*, every creditor has an inchoate interest in the suit from the moment the bill is filed, and from that moment time does not run against him, so that a simple contract creditor, coming in under a decree made in such suit, was admitted to prove, although there had been a lapse of more than six years between the filing of the bill and the decree.

In that case, counsel for the creditor argued that "the
"statute of limitations has not of itself any force in courts
"of equity. These courts have merely adopted a rule
"founded on the principles of that statute, and by analogy

"to it." And the Vice Chancellor, in giving the grounds of his decision, at page 396, says: "This case has been "reasoned on two fallacies, as applied to the jurisdiction "of the court: First, the statute does not bar the debt, "but the remedy only; and courts of law have permitted "the statute to be evaded by recognitions of the demand, "to such an extent as to amount almost to a repeal of "the statute. On this ground, I think that the debt "exists.

"The other fallacy is, that the statute bars the suit in "equity, which it does not. But, as courts of equity will "not entertain stale demands, they have thought proper "to adopt the limit of six years in analogy to the statute, "and pleas of the statute are admitted in these courts by "analogy only. Where the circumstances of a case are "such as to make it against conscience to apply the rule "founded upon this analogy, the court will not enforce it. "It has been said that, if a creditor files a bill on behalf "of himself and others, and permits it to be dismissed be- "fore decree, the statute would apply. I dissent from "this proposition, for I think that the court would protect "a creditor against any accident of that kind. I have no "doubt that, if a creditor file a bill, and it appears that "the rule adopted by analogy to the statute would affect "his demand, but that a bill had been before filed by an- "other creditor, and that the plaintiff in the second suit "had, in confidence that the former suit would be prose- "cuted, abstained from filing his bill, the court would not "apply this rule. Every creditor has, to a certain extent, "an inchoate interest in a suit instituted by one on behalf "of himself and the rest; and it would be attended with "mischievous consequences to estates of deceased debtors "if the court were to lay down a rule by which every

"creditor would be bound either to file his bill or bring "his action."

The principle of that case is this: As the statute of limitations is not binding upon courts of equity, but the court applies to stale demands the period prescribed in the statute, not in *obedience*, but by *analogy* to the statute, "where the circumstances of the case are such as to make "it against conscience to apply the rule founded upon this "analogy, the court will not enforce it." Accordingly, when there is a proceeding pending in behalf of the general creditors, each creditor may be presumed to have remained inactive and refrained from filing a bill in his own behalf, in the confidence that the former suit would be prosecuted and the payment of his claim enforced in that suit. His case is therefore excepted from the operation of the rule. This exception is not contained in the statute, but has its origin in this rule of equity. But this rule does not apply to cases which are not within the principle of it. It was accordingly held in *Barrington* v. *Evans*, 1 Young & Collyer Eq., 434, when the creditor was not aware of the pending suit, and *for that reason* did not come in to prove up his claim, he could not, after other creditors had proven up their claims, be let in by petition to claim his share of the fund in court, after his claim was barred by the statute. The case on this appeal now before the court is not within the principle of this rule. It was not a proceeding in behalf of the general creditors of the bank, and did not profess to be. It contained no prayer that the general creditors of the bank be paid in like manner with complainant out of the moneys collected from the stockholders, but the prayer is that these moneys, together with discovered assets of the bank, be paid into court, and that out of the fund thus created complain-

ant's judgment be paid in full, and that the balance then remaining should be distributed in such manner as the court should direct. The bill was, in July, 1883, further amended "*so as to show*" that it was filed in behalf of all the creditors, and the prayer was amended so as to carry out this object. This implies that the bill did not, apparently, have this character before this last amendment was made; consequently, the general creditors were not justified in remaining inactive in confidence that the then pending proceeding was being prosecuted in their behalf, and therefore in taking no steps to enforce the payment of their claims.

The doctrine that in this class of cases the statute of limitations does not bar suits in equity, and that courts of equity, acting not in obedience but by analogy to the statute, are at liberty to refuse to apply the statute, "when "the circumstances of the case 'make it against conscience "to apply the rule founded upon this analogy,'" does not obtain in this country. The rule here is that courts of equity act *in obedience* to the statute in all cases when they have concurrent jurisdiction with courts of law. That in such cases the statute of limitations is as much a command upon courts of equity as upon courts of law, and when the statute would bar an action at law it will bar a proceeding in equity.

Carroll v. *Green*, 92 U. S., 510, with cases before cited.

The doctrine of the above case of *Carroll* v. *Green*, 95 U. S., is this: where a proceeding in equity is instituted to enforce an obligation, if an action at law brought to enforce it would have been barred by the statute the proceeding in equity is barred. In other words the courts of

equity are as completely under the dominion of the statute as courts of law.

The statute of 3 and 4 Will. IV. in terms embraced proceedings in equity. This put an end to the rule laid down in *Sterndale* v. *Hankinson*, 1 Simons.

In the case of *Barrington* v. *Evans*, 1 Younge & Collyer, 434, which was under this statute of William, the Lord Chief Baron says, at page 439:

"At law, even before the statute, the petitioner could "not have enforced his judgment after twenty years. "The new statute fixes the time for bringing an action on "the judgment at law. The statute was also intended to "put an end altogether to the discretion of courts of "equity, in those cases where they had before acted by "analogy to the time limited at law. That was an anal-"ogy founded both in law and good sense, but it no "longer remains in the discretion of the court, but is in-"corporated in the statute. The words of the statute "are that, after a certain day, no action or suit or other "proceeding shall be brought to recover any sum of "money secured by any mortgage, judgment or lien, at "law or in equity, but within twenty years after the right "shall have accrued." * * *

"The statute says that such a claim shall not be made "after twenty years, unless in the meantime some part of "the money, either principal or interest thereon, shall have "been paid, or some acknowledgment shall have been "given in writing. These are the only exceptions men-"tioned in the act. Nothing is said of the case of a bill "being filed by one creditor for the benefit of the rest; "and I cannot engraft another exception on the act of "parliament. Considering, therefore, that this a pro-

"ceeding in equity to recover money upon a judgment "upon which twenty years have run, and that it comes "within none of the exceptions of the statute, I am of "the opinion that the claim is barred."

The above statute of 3 and 4 Will. is unnecessary in this country; for our courts of equity are as much under the statute when exercising concurrent jurisdiction with courts of law as though they were expressly named in the statute.

The case of *Sterndale* v. *Hankinson*, is an authority to the effect that, but for the rule laid down in that case, the statute would run against the claims of other creditors down to the entry of the decree, even when the bill is filed by one creditor in their behalf as well as his own.

In *Watron* v. *Birch*, 15 Simons, 523, held, that when a bill is filed by one creditor in behalf of himself alone, this does not prevent the running of the statute against the claims of the other creditors.

The following are the only claims not barred by the statute: Claim of complainant, claim of George W. Scott and John Wigley, who were made co-complainants March 17, 1875, and claim of First National Bank of Hastings, Minnesota, which was made a co-complainant September 2, 1878. The bank suspended September 26, 1873, when the right of action against the stockholders accrued.

The Third National Bank of St. Louis, David O. Smart and Charles Gudgell filed their petition to be made co-complainants February 12, 1875, but their petition was on their own motion dismissed February 14, 1879.

This was not a proceeding in favor of the general creditors of the bank against the stockholders, under the

second section of the amendatory act of 1876, until it was placed there by the amendment of July 23, 1883. This was more than five years after the passage of that act, and all the claims against the stockholders to enforce this statutory liability, including complainants claim, were then barred and the bill against them should have been dismissed. *Supra, Bushy* v. *Seymour*, 1 Jones & Towshe, 577.

V.

STOCKHOLDERS CAN ONLY BE REQUIRED TO PAY THE DEBTS OF THE BANK AS THEY EXISTED AT THE TIME IT WENT INTO LIQUIDATION.

Much the larger portion of the claims brought in under this proceeding, which the stockholders are called upon to pay, are based upon endorsements and guaranties of commercial paper belonging to the bank at the time it went into liquidation, and which was afterwards given to creditors in settlement and payment of their claims against the bank. It is claimed that these endorsements and guaranties made after the bank went into liquidation "are contracts, debts and engagements of the associa-"tion," for which the stockholders are responsible within the meaning of the act creating national banks.

The object of the national bank act was to induce capital to take that form of investment in order to furnish the country in its then financial exigency with a currency based upon the obligations of the government. Those taking stock in the banks organized under this law, furnished the money with which these obligations were purchased, and the business of the bank was carried on at their risk.

They were not only exposed to a loss of the money invested, but in thus organizing a bank they placed themselves under an obligation to contribute in addition an equal amount, if necessary, to pay off and discharge the debts of the bank, and in any event the debts of the bank must be paid before any portion of the money invested could be returned to them. If, in their judgment, the business of the bank should prove to be unprofitable, the law gave them the right to close the bank and place it in liquidation at any time, by a vote of those owning two-thirds of the stock.

In the case of *Fleckner* v. *Bank of the United States*, 8 Wheaton, 362, the Supreme court, by Mr. Justice STOREY, says: "Some criticism has been employed on "the meaning of the word 'liquidate' in the resolution "above stated. It is said to mean not a payment but an "ascertainment of the debts of the bank. We think other-"wise. Its ordinary sense as given by lexicographers is "to clear away, to lessen debt, and in common parlance, "especially among merchants, to liquidate a balance is "to pay it." Therefore for a bank "to go into liquida-"tion and be closed," is to enter upon the business of paying its debts with a view to a distribution of its assets then remaining to its stockholders, and in the event that its assets are not sufficient to pay its debts, to ascertain the extent of the statutory liability of its stockholders for the deficiency. To this effect is the language of this court in *National Bank* v. *Insurance Co.*, 104 U. S., 54. In replying to the contention that in going into voluntary liquidation, the corporation was dissolved, and its existence as a legal entity terminated so that it could not afterwards be sued, at page 74, the court say: "The association goes into liquidation and is

"closed. It is required to give notice that it is closing up "its affairs, and in order to do so completely and effect- "ually, to notify its creditors to present their claims for "payment, and the redemption of its bonds given to "secure the payment of its circulating notes by the "required deposit of money in the treasury, is limited "in its effect to a discharge of the association and "its shareholders from all liability upon its circulating "notes. The very purpose of the liquidation provided "for is to pay the debts of the corporation, that the "remainder of the assets being reduced to money, may "be distributed among the stockholders. That distribu- "tion cannot take place with any show of justice and "according to the intent of the law until all liabilities to "creditors have been honestly met and paid. * * * "It is clearly, we think, the intention of the law that it "should continue to exist as a person in law, capable of "suing and being sued, until its affairs and business are "completely settled. The proceeding prescribed by the "law seems to resemble not the technical dissolution of a "corporation without any saving as to the common law "consequences, but rather that of the dissolution of a co- "partnership, which nevertheless continues to exist for "the purpose of liquidation and winding up its business."

We must presume that the defendants in this case invested their money in the capital stock of this bank in view of their right to close the bank and place it in liquidadation when they should deem it for their interest to do so. It is a legal right residing in the stockholders given them by the legislative department of the government, and the judicial department should so administer the law as to give full effect to this right.

What is a legal right? Austin, in his lectures on Jurisprudence, defines it as "that security for the enjoyment "of a good or advantage which arises from a duty imposed "upon another or others." Therefore to say that the stockholders have a right to close the bank and place it in liquidation, is to say that the officers of the bank and all other persons are under a duty to refrain from all acts that interfere with the exercise or enjoyment of this right. The law which confers this right, *ex necessitate*, imposes this duty. Indeed, no right can be said to reside in one person in the absence of a corresponding duty imposed upon another or other persons. In going into liquidation, the status or condition of the bank is essentially changed. The only purpose of its continued existence is, in the language of the Supreme court, "to pay the debts of the "corporation, that the remainder of the assets, being "reduced to money, may be distributed among the stock-"holders," and the court likens it to a dissolved co-partnership. It has no capacity to contract debts, but simply to pay them. As the object in placing the bank in liquidation was to put an end to the enterprise and terminate the exposure of the stockholders to further loss, the officers and even directors of the bank had no authority to place additional burdens upon the stockholders in the form of new contracts and new engagements made in the name of the bank, especially when the parties in whose favor these new contracts and engagements were made knew that the bank was then in liquidation.

A right in the officers of the bank to make new contracts or engagements cannot consist with the right of its stockholders to place the bank in liquidation. This right of the stockholders can only be enforced by the extin-

guishment of this right or power in the officers, and placing them under the duty of clearing away the debts of the bank, that being the object for which the bank was placed in liquidation. To give validity to new obligations made by the officers of a bank in liquidation, and compel the stockholders to contribute to their payment, is to defeat, in the most emphatic way, the right to close the bank, and place it in liquidation. The decision of the Supreme court, which we have quoted, is in effect that the determination of its stockholders properly expressed to place the bank in liquidation and close it, terminates the power of the officers to place the bank under new obligations, and they say its condition resembles that of a dissolved copartnership.

The law is well settled that the dissolution of a copartnership terminates the power of one partner to make contracts in the name of the firm. The doctrine upon this subject is fully stated by Chancellor KENT, in the third volume of his Commentaries, page 63, and is fully sustained by authorities cited in the note. This is what he says:

"When a partnership is actually ended by death, notice "or other effectual mode, no person can make use of the "joint property in the way of trade or inconsistently with "the purpose of settling the affairs of the partnership, "and winding up the concern. The power of one part-"ner to bind the firm ceases immediately on its dissolu-"tion, provided the dissolution be occasioned by death or "bankruptcy, or operation of law, though in cases of "voluntary dissolution due notice is requisite to prevent "imposition on third persons who might continue to deal "with the firm. The partners from that time become

"distinct persons and tenants in common of the joint "stock. One partner cannot indorse bills and notes pre- "viously given to the firm, nor renew a partnership note, "nor accept a bill previously drawn on it, so as to bind "it. He cannot impose new obligations upon the firm, "or vary the form or character of those already existing. "If the paper was even endorsed before dissolution, and "not put into circulation until afterwards, all the partners "must unite in putting it into circulation, in order to bind "them."

In *White* v. *Knox*, 111 U. S. R., 787, this court says: "The business of the bank must stop when insolvency is "declared." (Rev. Stat., Sec. 5228.) No new debt can be made after that.

The bank at the time it suspended and went into liquidation was indebted to the parties who presented claims designated in the master's report as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 21, 23, 24, 28, 29, 30, 31, 32, 33, 36, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 46 and 52, and aggregating $185,119.24 for moneys on deposit with the bank, and who received in payment of these claims, commercial paper held by the bank, and which it received in the course of its business, running some of it several months, and some of it several years, and bearing interest, some at eight per cent., and some at ten per cent., and which was endorsed and guaranteed in the name of the bank by its officers long after it went into liquidation; much the larger portion of these claims, to wit: Nos. 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17, 19, 20, 21, 23, 30, 31, 36, 37, 45, 46, 47 and 52, are in the form of judgments recovered against the bank upon these endorsements and guarantees. It is true that they intro-

duced in evidence the accounts with these various parties as found upon the books of the bank, but these accounts had no connection with the judgments given in evidence. They were merely transcripts from the books of the bank, and in every instance they were balanced after the suspension, and when the settlements spoken of by Holmes were made. The remainder of these claims were the endorsements and guarantees upon the notes turned out. Not one of them was for money on deposit when the bank failed. It is admitted that the bank was placed in liquidation and closed by the requisite vote of the stockholders on the 25th of September, 1873, and it appears that the notice required by section 5,221 of the statute, informing the public of the fact, and notifying the holders of its notes and all other creditors to present the notes against the bank for payment, was duly published. Witness Holmes says that these creditors received this commercial paper in payment of their claims, *and gave their checks to the bank for the amount standing to their credit.* The deposition of the creditors and those who represented them in these settlements were taken, but they do not contradict Holmes in respect to the acts done, nor do they deny, except in one or two instances, that when they received the commercial paper they gave to the bank a check for the amount due. They merely give their own construction of the transaction in view of what has since transpired and claim that the obligation of the bank was continued. But the question of what effect this change in the nature and character of the obligation had upon the statutory liability of the stockholders does not seem to have been considered. It is stated in the amended bill, filed October, 1876, that in the process of liquidation the bank had settled a large part of its indebtedness, and that it was then owing about

$40,000. This could only be upon the supposition that the turning over of this commercial paper by the bank was in payment of these claims.

The expression in the statute, "the shareholders of "every national banking association shall be held to be "individually responsible * * * for all "contracts, debts and engagements of such association," must be construed as meaning all contracts, debts and engagements of such association *contracted in the course of its business;* for it is only by giving this meaning to the expression that effect can be given to the right granted in the same statute, to its stockholders, to put the bank in liquidation and close it. When the stockholders exercise this right that terminates the right of its officers to enter into any new obligations in the name of the bank, affecting the stockholders. The debts the bank owed these creditors when it went into liquidation, were in the form of credit balances for deposits. They were payable on demand, and drew interest at the rate of six per cent. per annum. The claim upon the stockholders to pay them would have been barred by the statute of limitations, if not prosecuted, within five years. These were the debts for which the stockholders were responsible, not as principal debtors, but as sureties for the bank. They were contracted, not in the name of the stockholders, but in the name of the bank.

After the bank went into liquidation, its officers paid off these debts, by paying money for a portion of them, in some instances, and handing over to the creditors commercial paper belonging to the bank and which it had received in the course of its business; that is the obligation to the bank, of third parties. These obligations were re-

ceived by creditors, in payment and satisfaction of these balances; that is, of the claims of these creditors against the bank; and they gave to the bank their checks for the sums standing to their credit on the books of the bank. It cannot be successfully contended that the parties on both sides did not understand the transactions as amounting to payment and satisfaction of these debts of the bank; that is, of the debts the bank owed when it went into liquidation.

Each of these transactions was in law a novation; that is, the substituting of a new obligation or contract, in the place of, and for the purpose of destroying, the old or former contract or obligation.

BIRGE, in his work on Suretyship, page 167, says:

"Voluntary novation takes place when the debtor and "creditor enter into a new obligation or contract; which "they consent shall be substituted in the place of, and with "the intention of destroying, their old or former contract "or obligation." "Whenever the subsequent is inconsis-"tent or incompatible with the previous obligation, it must "be considered as substituted for and extinguishing the "former, and therefore is a novation." (Page 169.)

The same author, at page 171, says:

"The effect of novation, is that the prior obligation, to-"gether with its accessions and privileges, is destroyed."

Again, at page 172:

"From the principle that novation extinguishes the "ancient debt, it follows, also, that it extinguishes the hy-"pothecations which are accessory to it."

Each of these transactions was a novation, by giving

to the creditor the obligation of a third party to the bank, in the place of the obligation of the bank to such creditor.

The same author says, page 173:

"Delegation is novation effected by the intervention of "another person whom the debtor in order to be liberated "from his creditor gives to such creditor, or to him whom "the creditor appoints, and such person so given be- "comes obliged to the creditor in place of the original "debtor."

"When the delegation is valid, that is, when the per- "son delegated has contracted a valid obligation to the "creditor, the person delegating, that is, the original "debtor, is discharged, and he is not responsible to the "creditor in the event of the insolvency of the debtor "delegated." (Page 177.)

The makers of this negotiable paper agreed in making the paper to pay the amount specified to whomsoever it should be legally transferred. A transfer of the paper by the bank to the creditors of the bank was a delegation within the meaning of the language above quoted, and the creditors of the bank, in accepting the paper, accepted the makers as their debtors in the place of the bank, whose debts were thereby extinguished. The paper thus turned over to and accepted by the creditors cannot be treated as collateral security for the debts of the bank. It is not pretended that any fraud was practiced upon the creditors, or that they were in any instance induced by misrepresentation respecting the solvency of the makers, to accept this paper. The creditors in every instance selected the paper after an opportunity given them to make inquiries respecting the pecuniary responsibility of the makers.

Indeed the court was not asked to set the transactions aside, nor were the creditors attempting in this proceeding to enforce the payment of their claims against the bank, as they stood at the time the bank went into liquidation. They presented these indorsements and guaranties made by the officers of the bank after it went into liquidation as engagements of the bank for which the stockholders are responsible within the meaning of the act.

Some of this paper is secured by mortgage upon real estate. It is all of it time paper, some of it running several months, and others of it several years, and all of it bearing interest at the rate of eight or ten per cent. per annum. If the stockholders are regarded in the light of sureties of the bank, as most cases hold, then the giving of time to their principal, the bank, in such a way as to prevent proceedings against the bank for the recovery of the original debt, absolves the stockholders from their obligation as sureties.

Hamon v. *Donkersby*, 37 Mich., 184.
Powell v. *Eldred*, 39 Mich., 552.

If proceedings had been instituted by any one of these creditors against the bank for the recovery of the original debt, the bank could have successfully replied the giving and reception of this commercial paper as an accord and satisfaction.

Holmes, in his testimony, says that where creditors insisted upon it he gave his own notes, guaranteed by the bank, in settlement of their claims, and that much of the paper turned out was secured by real estate. He gives the then financial standing of the makers of the paper, and says that he then believed all of it was good, and

that it had a commercial value. If the creditors, instead of receiving this paper in payment of their debts, had insisted upon payment in cash, then a receiver would have been appointed, and the assets of the bank would have been sold at auction, possibly for a sum sufficient to pay off the debts of the bank, and then there would have been no occasion to resort to the statutory liability of stockholders.

In accepting this commercial paper and retaining it, the creditors deprived the bank and its stockholders of the ability to thus dispose of the assets of the bank or to use them in any other way than that in which they had already been used in paying the debts of the bank: and if the transaction did not operate *pro tanto* as a liquidation or payment of the debts of the bank, then the placing it in liquidation was an idle ceremony. Even if the creditors were proceeding to set aside these transactions and prove up their claims against the bank as they existed at the time it went into liquidation, they would not be allowed to do so without first restoring or offering to restore to the bank all they have received, so that both parties can be placed *in statu quo*. This they manifestly cannot do. After the lapse of ten years, and the great change that has taken place in the character of this paper —that is, in the pecuniary responsibility of its makers— the parties cannot be placed in the positions they were in before these transactions took place. In any view of the case, I do not see how the defendant stockholders can legally be required to contribute to the payment of the claims represented by these endorsements and guaranties.

VI.

The court erred in directing each stockholder to pay the amount assessed upon his stock to the receiver appointed by the court in the proceeding by creditors' bill, long before the stockholders were made parties defendant, and in including in such assessment the cost of the receivership.

The court must have regarded this amount as an asset of the bank under the control of the receiver, and to be collected by him and placed upon the same footing with other assets of the bank. We think we have shown on pages 24 & 25 that the money due under the statutory liability of a stockholder is not an asset of the bank, and that a receiver of the assets of the bank does not through his appointment obtain any title to it.

It was insisted in the court below, and counsel for the creditors may again insist, that stockholders can make no defense to the claims upon which judgments were recovered against the bank; that they are concluded by these judgments, and in support of this contention the case of *Slee* v. *Bloom*, 20 Johns., 669, was relied upon. This case is thoroughly reviewed in *Moss* v. *McCullough*, 5 Hill, 131, and it was there distinctly held that in an action by a creditor against the stockholder the judgment obtained against the corporation could not be used by the plaintiff as conclusive or even *prima facie* evidence of the genuineness or validity of the debt. To the same effect is *Bonaffee* v. *Fowler*, 7 Paige, 576.

No defense was made in the suits in which those judgments were recovered. The stockholders were not par-

ties in these suits, nor did theyk now anything about them. It will be very strange if they cannot now make this defense when it appears upon the face of the judgments that the officers of the bank had no authority to make the endorsements and guaranties upon which those judgments were recovered. Suit against the stockholders must be brought not upon the judgment against the bank but upon the original claim of the creditor.

Since writing the above, we have received a copy of the printed record of the case, and learn from it that on the 1st of June, 1886, the opinion of the court was filed giving the reasons for the interlocutory decree of July 23, 1883, and also the opinion of the court giving the reasons for the final decree of June 1, 1886.

As the views of the case held by the learned judge who heard and decided it are justly entitled to very great weight, we trust we shall be allowed to make the best answer we can to them by way of supplement.

In the opinion of the court below the amount due under the statutory liability of a shareholder is an asset of the bank, and the amendment of the bill in October, 1876, did not change, but simply enlarged the scope of the bill "in reference to the number of persons to be acted upon." That the stockholders, in respect to their liability on their stock, were to be regarded and treated as persons who have assets of the bank in their hands.

That the bill by the amendment of October 5, 1876, became a proper bill under the act of June 30, 1876. The further amendment of July 23, 1883, stating that the bill was filed in behalf of complainant and all other creditors "was "entirely unnecessary, and being filed under the statute

"which directed that it could only operate in behalf of "complainant and all other creditors, the law gave direc- "tion and force to all that could be done under it and the "provision of the act of 1876, authorizing the filing of this "bill is not to be considered as a rule of practice or a rule "for the framing of the bill, but as a rule defining the "rights of parties under such a bill, and whether such a "bill professed upon its face to be filed in behalf of com- "plainant and all other creditors; the court will give it "such direction and force and no other; and hence from "the time this amended and supplemental bill was filed in "October, 1876, it has been a proper bill under which to "enforce the individual liability of these shareholders. "Taking this view of the case, I therefore conclude that "when this amended and supplemental bill was filed it "brought all the creditors of the bank before the court, and "was a bill for their benefit as much if they had been com- "plainants or parties to it in any form, and that therefore "if the statute of limitations had begun to run in favor of "the bank against its creditors the filing of this bill was the "bringing of a suit by each creditor so as to suspend the "running of the statute. For the purpose of asserting "their rights it was not necessary, I think, for creditors "to intervene and make themselves parties to this pro- "ceeding, but the court looking upon this as a special "case of statutory jurisdiction would consider the bill as "a suit by each creditor for the purpose of enforcing the "collection of his debt." All the rulings in the court be- low are upon the assumption that the amount due from a shareholder in a national bank is an asset of the bank, of the same character as the amount due upon a sub- scription to its capital stock, and when the stockholders are made defendants in a bill filed by a single judgment

creditor in his own behalf to reach the assets of the bank, the court will treat all the creditors of the bank, including simple contract as well as judgment creditors, without their appearance or any action on their part, as co-complainants in the suit.

As we have already said, the object of the National Bank Act was to give to the country in its then financial exigency a reliable currency consisting of circulating notes issued by banks organized under the act, and secured by United States registered bonds deposited with the secretary of the treasury and the individual liability of stockholders. The 50th section of the act, being section 5,234 of Revised Statutes, provides that if any bank has refused to pay its circulating notes the controller of the currency may forthwith appoint a receiver, who shall take possession of the assets of the bank, etc., "and may, if "necessary to pay the debts of the bank, enforce the in-"dividual liability of the stockholders." This is the only remedy in the act for enforcing the liability of stockholders, and it can only be used when the bank has failed to pay its circulating notes. This bank went into voluntary liquidation and paid its circulating notes, and the amended bill alleges (page 27) that because the bank had gone into voluntary liquidation the controller, in January, 1875, refused to appoint a receiver. The creditors, therefore, were remitted to such remedies as the law, independent of the act, furnished for enforcing this liability.

In *Pollard* v. *Bailey*, 20 Wallace, 527, this court says: "A general liability created by statute without a remedy "may be enforced by an appropriate common law "action."

In that case the court found a remedy in equity provided for in the statute creating the liability. The second section of the act of July 30, 1876, provided: "That "whenever any national banking association shall have "gone into liquidation * * * the individual liability "of the shareholders * * * may be enforced by bill "in equity in the nature of a creditor's bill brought by "such creditor on behalf of himself and of all other "creditors of the association against the stockholders "thereof in any court of the United States." If this remedy was substantially available to the creditors before this act was passed, why was it passed? Whatever may have been the remedy before, from this time forth the remedy for enforcing the stockholders' liability provided for in this act became the sole and exclusive remedy. We have insisted and still insist that it must be by a new bill and cannot be engrafted upon a bill filed before the act was passed to reach assets of the bank. It seems to be conceded in the opinions filed that this position is correct unless the amount due under the statutory liability of the shareholder is an asset of the bank. To whom does this obligation of the shareholder run, to the bank, or to the creditors of the bank? If to the bank, then it is an asset of the bank; if to the creditors of the bank, then it is not an asset of the bank. In *Hawthorn* v. *Calef*, 2 Wal., 22, this court by Justice NELSON says: "Now "it is quite clear that the personal liability clause in the "charter in the present case pledges the liability or "guarantee of the stockholders to the extent of their "stock to the creditors of the company, and to which "pledge or guarantee the stockholders by subscribing "for stock and becoming members of it have assented. "They thereby virtually agree to become security to the

" creditors for the payment of the debts of the company " which have been created upon the faith of this liability."

To the same effect is *Carrol* v. *Green*, 92 U. S. Rep., 509.

The fact that the remedy ~~provided~~ for enforcing this liability when a bank has gone into liquidation, provided by Sec. 2 of the act of June 30, 1876, is by bill in equity, filed in behalf of all the creditors against all the stockholders, without requiring the bank to be a party to the proceeding, shows conclusively that this liability runs not to the bank, but to the creditors of the bank. The solicitor for the complainant in October, 1876, with the act of June 30 before him, providing for enforcing this liability by a bill in the nature of a creditor's bill, to be filed by one creditor in behalf of all, against all the stockholders, instead of filing a bill under this statute, chose to amend the bill he had already filed by making the shareholders parties defendant, as his client would thereby, upon the supposition that the amount due under their statutory liability was an asset of the bank, obtain priority of payment by reason of his greater diligence. To avoid the objections made at the hearing in July, 1883, to the prosecution of the suit under the bill as it then stood, by leave of court, he amended the bill by changing it from a bill in his own behalf to a bill in behalf of all the creditors of the bank, and by making a corresponding change in the prayer of the bill, with a view to placing the proceeding under the second section of the amendatory act of 1876. In answer to the defense made by the stockholders, that the statute of limitations ran against the claims of the other creditors, the court, on the final hearing held that the amendment of July 23, 1883, was an immaterial

amendment, that it was entirely unnecessary, that the bill was placed under the act of July 30, 1876, by the amendment in October of that year, and that although it was a bill in behalf of complainant alone, yet the court, by reason of that act, would treat it as a bill filed in behalf of complainant and all other creditors of the bank, and that it had the effect of arresting the statute of limitations, as to the claims of all creditors of the bank against the stockholders. There is nothing in this act indicating that Congress, in giving a remedy in equity to the creditors against the shareholders, intended to change or abrogate any of the rules of chancery practice. We must therefore conclude that the intention was that this remedy should be administered in conformity to these rules.

It is an inflexible rule of chancery practice that when it appears on the face of the bill filed by a party in his own behalf that he is one of a numerous class who are entitled to the same relief a demurrer will lie to the bill, and the court will refuse to proceed unless the other members of the class are made co-complainants or the bill is changed by amendment to a bill in behalf of all the persons composing the class, and if the case goes on without such amendment it will be dismissed at the hearing. (Cases cited on pages 29-30.) Story, in his Equity Pleadings, says, section 96: "And even in the cases in which the court "will thus administer relief, so solicitous is it to attain the "purposes of substantial justice that it will generally re- "quire the bill to be filed not only in behalf of the "plaintiff, but also in behalf of all other persons inter- "ested who are not directly made parties (although in a "sense they are thus made so), so that they may come "in under the decree and take the benefit of it, or show "it to be erroneous, or entitle themselves to a rehearing."

And again, in section 99, the same author says: "But a "few creditors will not be permitted to bring a bill of this "sort for an account and administration of the assets "without saying in the bill that it is brought on behalf of "themselves and all the rest of the creditors." The statute of 1876 did not lay down, but recognized an established ~~mode~~ rule of chancery practice when it directed the bill to be filed by any creditor "on behalf of himself and "of all other creditors of the association."

If the court would entertain a demurrer to a bill filed by a single creditor in his own behalf, or dismiss such a bill at the final hearing, how can it regard and treat ~~such a bill~~ it as a bill filed in behalf of all the creditors? Before the amendment of July 23, 1883, the only parties complainants before the court were the representatives of the Irons estate, and such of the judgment creditors as had then been made parties. As was said by the Lord Chancellor in *Busby* v. *Seymour*, 1 Jones and Tourche, 527, this amendment in effect made the suit "a new suit, bringing "new parties before the court and seeking new relief."

Upon the subject of limitations the court says, page 493: "Taking this view of the case I therefore conclude "that when the amended and supplemental bill was filed "it brought all the creditors of the bank before the court, "and was a bill for their benefit as much as if they had "been complainants or parties to it in any form, and that "therefore if the statute of limitations had begun to run "in favor of the bank against its creditors, the filing of "this bill was the bringing of a suit by each creditor, so "as to suspend the running of the statute."

The bill as amended in October, 1876, is called an amended and *supplemental* bill for the first time in this

opinion. The question whether the statute had run "in "favor of the bank against its creditors," did not arise in the case; but whether it had run in favor of the shareholders against the creditors of the bank. We think the law is well settled that an action cannot be said to have been brought by a creditor against a stockholder until he has entered a suit in his own name or presented his claim, or in some manner brought it to the attention of the court in a suit already commenced in his behalf.

In *Hall* v. *Cresswell*, 12 Gill & J., 36, it is held that the statute of limitations runs against a claim or debt up to the time it is exhibited or filed in chancery.

The commencement of an action for the administration of an estate does not save any claims but those of the plaintiff from the operation of the statute, but the statute continues to run against them until they are presented. *Bray* v. *Tofield*, Law Reports, Chancery Division, Vol. 18, 551.

In *Sterndale* v. *Hankinson*, 1 Simons, 394, the bill was filed by one creditor *in behalf of himself and all the other creditors*, and the only reason given by the Vice Chancellor why the statute did not run against the claims of other creditors than the claimant was, that courts of equity acted not in obedience but in analogy to the statute, and a court of equity would not apply the statute against a creditor "who had, in confidence that the former suit would be "prosecuted, abstained from filing his bill." That doctrine does not obtain in this country. Here, courts of equity act in obedience to the statute.

In the case of *Carrol et al.* v. *Green*, 92 U. S., 509, being a suit in equity brought by creditors against stockholders to enforce their statutory liability, the only ques-

tion considered by the court was the statute of limitations, and it was held that as the liability of the stockholders arose from their acceptance of the act creating the corporation and their implied promise to fulfill its requirements, the proper remedy was an action on the case, and that as the statute barred such an action at law, it was also a good defense in equity.

In this case any creditor could have prosecuted his claim against the stockholders within the five years, and he was not justified in looking to this suit for relief, as it was not being prosecuted in his behalf.

The court says, page 495: "I am satisfied, however, "from the proof, that the creditors who took this com- "mercial paper did not take it in payment of the indebt- "edness due them from the bank, but took it as collateral "to such indebtedness, and that only so far as such paper "has proved collectible and been made available by such "creditors, should it be deemed a payment of the bank's "indebtedness."

Ira Holmes says (pages 334 and 335 of record), that the parties to whom this paper was given knew at the time that the bank was in liquidation. That in each and every instance the paper was given to the creditor in full payment of his demand against the bank, and that the creditor upon receiving the paper gave to the bank a check for the amount standing to his credit, "the same as "if he were doing a regular business and the parties "should come in and buy so much bills receivable and "give me a check on another bank"; and it appears from the accounts with these creditors, as found in the books of the bank, pages 295 320, that in almost every instance these accounts were balanced at the time these payments were made.

A claim in favor of Grundy County National Bank for $7,757.13, being claim No. 14, in schedule of claims allowed, page 287, is allowed. C. H. Goold, who testified for claimant, says, page 300: "I had no dealings with "the bank in relation to this claim, but did in regard to "some other claims taken of the bank at that time that "have been paid or otherwise settled. * * * The notes "and papers taken by me was in payment for the claims "of the Grundy County National Bank against the Manu"facturers' National Bank, and was endorsed by the "cashier and president." The claim spoken of by the witness as the one in respect to which he had no dealings with the bank, or as the one allowed, is found on page 302, and was the promissory note of S. M. Nickerson to the Grundy County National Bank for $4,500, dated January 2, 1884, several months after the Manufacturers' National Bank went into liquidation, and payable four months after date, and guaranteed by the Manufacturers' National Bank. Holmes had forgotten about this note, but it appears from his testimony, page 349, that it had no connection with anything due from the last mentioned bank at the time of its failure.

Claim No. 52, page 288, for $20,143.64, is allowed the First National Bank of Hastings. Holmes testifies in reference to this claim, page 354 of printed record, that his bank at the time it went into liquidation was indebted to the Hastings bank in the sum of $11,000.44, and that there was a settlement on the 12th of January, 1874, in which his bank paid a portion of the debt in cash, and gave the note of S. W. Nickerson for $5,000 for the balance. Judgment was recovered against his bank, as endorser of this note, page 309, and this is the basis of the claim allowed. There is not a syllable of testimony in

the record tending to show that the note was not taken in payment of balance of account. Counsel for the other appellants will call the attention of the court to many similar instances.

Witnesses, in behalf of claimants, in several instances state that in taking this commercial paper they did not release their claim upon the bank. They do not deny, except in one or two instances, that they gave to the bank a check for the amount due from it at the time it went into liquidation. They evidently mean by this statement that the obligation of the bank was continued by reason of its guarantee or endorsement, and Judge Blodgett says in his opinion, page 495: "Turning over this commercial "paper upon the debts of the bank was not the contract-"ing of a new debt, but an attempt to satisfy an old one, "and the endorsements and guarantees of the paper only "operated to keep the obligation of the bank alive, and "give the holder recourse over against the bank in case "the paper turned over was not collectible." Take the first case, that of the Third National Bank of St. Louis, page 371, John R. Lionberger in his testimony in behalf of the bank, says: "There was no agreement "other than that before I consented to take the notes "referred to I demanded the bank's endorsement thereon, "which was done." Again, page 372: "I do not re-"member that in talking the matter over with Mr. "Holmes that he would simply give me the notes in set-"tlement of our claim without the endorsement of the "bank. This proposition I declined and insisted upon the "bank's endorsement, which was made." That is, he took the paper with the bank's endorsement in settlement of the claim; substantially the same testimony in regard to claim No. 4, page 385; claims No. 9, 10 and 11, pages

387, 388; claim No. 23, pages, 394, 395; claim No. 17, page 397; claim No. 24, page 400; claim No. 5, page 402; claim No. 7, page 406; claim No. 8, page 410; claim No. 28, pages 412, 413; claim No. 6, pages 420, 421, 422. In no instance where commercial paper was taken did the claimant prosecute the original demand, but in every instance recovered judgments against the bank upon the endorsement or guarantee, as the case might be, or presented the note with the endorsement or guarantee upon it. And in affidavits on pages 425 and 475 it is stated in behalf of each claimant: "That there are no "collaterals or other securities in the matter of said in- "debtedness other than those introduced in evidence in "this case." These claimants are therefore endeavoring to hold the shareholders upon the endorsements and guarantees made in the name of the bank by its officers after the shareholders had placed it in liquidation. After this lapse of time and the changed condition of the parties to the commercial paper it would be manifestly unjust to vacate these settlements and proceed against the shareholders for the original claims against the bank.

If these endorsements and guarantees had been made before the bank suspended and in the regular course of its business, this defense could not have been made by the stockholders (*People's Bank* v. *National Bank*, 101 U. S. Rep., 181); but when made after the bank was placed in liquidation, they could not, we respectfully insist, have any further effect than to transfer the legal title to the paper on which they were written.

HENRY G. MILLER,
For Appellant, Richmond.

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No. 982.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

ALONZO RICHMOND ET AL.

vs.

JOEL D. HARVEY, RECEIVER OF THE MANUFACTURERS NATIONAL BANK ET AL.

BRIEF AND ARGUMENT FOR APPELLEES.

D. J. SCHUYLER and
~~HENRY L.~~ EDWARD G. MASON,
ATTORNEYS FOR APPELLEES.

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STATEMENT OF THE CASE.

[Note—The bracketed references herein refer to pages of the printed transcript of record.]

MAY IT PLEASE THE COURT:

The original complainant, James Irons, filed a creditor's bill February 3, 1875, against the Manufacturers' National Bank and Ira Holmes, upon a judgment alleged to have been recovered against the bank on or about December 2, 1874, for the sum of $12,408.51. Bill further states that an execution was issued during the next month, served and returned, no property found. The bill proceeds that on or about October 11, 1873, the bank suspended payment and closed its doors; that the bank had

then assets aggregating some $2,600,000, a sum in excess of its liabilities; that about that time it went into voluntary liquidation, making payments outright on some claims, but settling other claims by giving notes made by Holmes, as president of the bank, and guaranteed by him; that many of such notes are due and are subsisting claims against the bank; that large amounts of the assets have been converted to the use of or are held by Holmes and unknown persons, who, when discovered, are prayed to be made defendants to the bill; that the voluntary liquidation was a sham to defraud the bank creditors; that the circulating notes of the bank have been redeemed, and the United States bonds securing circulation have come into Holmes' possession or control, who is using them for his private purposes, in fraud of creditors; that preferential payments are being made to some creditors. The bill excuses any indefiniteness in its allegations on the ground that the bank books and papers are in the possession of Holmes, who refuses to disclose them, but it further alleges that the capital stock, at the time of suspension, was $500,000, and states the names of stockholders. Bill prays a discovery and surrender of all assets, payment of complainant's judgment, an injunction against assignments or preferences, the appointment of a receiver and general relief. (pages 1–9.)

The demurrer of the bank and Ira Holmes was filed February 12, 1875, in which it is alleged, among other things, that a receiver of a national bank can only be appointed and the funds distributed by the comptroller of the currency. (page 13.)

On February 26, 1875, the demurrer was overruled, and Joel D. Harvey appointed receiver. (page 15.)

The joint answer of the bank and Ira Holmes was filed

April 1, 1875. It admits complainant's judgment; admits that the bank went into voluntary liquidation, but states the date to be September 26, 1873; states that the assets were nominally in excess of the liabilities; admits preferential payments; claims only $39,000 to be now due depositors; denies that Holmes' notes, given in settlement, were guaranteed by the bank, but states in a few instances the bank indorsed them; denies any fraud or conversion of the bank assets; states that Holmes exhausted his private fortune in paying bank debts; states that the voluntary liquidation was made in good faith; states that the assets of the bank are nearly, if not wholly, worthless; admits that the bank's circulating notes have been redeemed; says that stock in name of Edgar Holmes stood for convenience merely, and really belonged to Ira Holmes, and that the said stock, and also the stock of Snyder, Comstock, Leonard and Wickersham was transferred to Ira Holmes September 24, 1873; says that valid settlements were made with certain creditors, under the belief that the bank and Ira Holmes were then solvent; that the complainant refused a reasonable offer of settlement. The answer is sworn to. (page 19.)

By leave of the court (page 25), amended bill was filed by said complainant October 5, 1876, and states corporate organization of the Manufacturers' National Bank; capital stock, $500,000, or thereabouts, in 5,000 equal shares; suspension of the bank on or about September 22, 1873; insolvency of the bank at that time, and prior and subsequent thereto; judgment of $12,408.51 rendered for complainant against the bank December 2, 1874; execution issued and returned about February 1, 1875, no part satisfied; voluntary liquidation of the bank by consent of officers and stockholders; settlement of

some indebtedness, but about $40,000 indebtedness still existing; refusal of the comptroller to appoint a receiver; list of defendants alleged to be stockholders, and number of shares of each; pretended purchase and cancellation of certain stock after bank's insolvency and suspension of payment; stockholders' knowledge of bank's insolvency at the time; such stock still standing on the books of the bank in the name of such stockholders; discovery asked concerning all shares of stock; specific inquiries on the foregoing subjects, including the number of shares held by each defendant. The prayer of the bill is for an account of all the bank's present ascertainable indebtedness, and of the amounts due complainant, and to the judgment and other creditors made parties to the suit by interpleader or otherwise; that complainant's judgment be made a first lien upon all assets discovered by this proceeding; that collusive transfers be set aside and each stockholder be subjected to the liability created by the statute; that an account be taken of the amounts due from the owners of all the shares of stock, "in pur- "suance of the provisions of the act under which the said "bank was organized, and by which the liability of the "stockholders thereof is fixed and determined;" and that they be decreed to pay into court, or to the receiver, amounts due from them and each of them respectively upon their stock liability, or otherwise; that complainant be paid in full, and the balance distributed among the other creditors of the bank; that defendants answer under oath; prayer for an injunction and general relief. Bill is sworn to by complainant's agent (pages 25–35).

From time to time, various persons prayed and obtained leave to prove up claims against the bank (pages 11, 13, 16, 58, 98, 99, 131, 149, 158, 161, 164, 166, 168, 171, 178, 179, 186, 187).

Motions were made by different defendants to strike the amended bill from the files as leaving out old matters and introducing new matters inconsistent with the original bill. Demurrers were filed by other defendants, and an answer by one (pages 40–48).

Then came a bill of revivor by the executrix and executor of the original complainant, presenting letters testamentary. This bill waives answer under oath. It was filed May 9, 1877 (pages 48–51). On June 6, 1878, the suit was revived in the names of the executrix and executor, in the same plight and condition as it stood at original complainant's death (page 57), and on October 1 and 10, 1878, demurrers to amended bill were overruled, and defendants ruled to answer (page 60).

The answers, as amended, admit in general that the bank suspended payment and went into voluntary liquidation, but put us on proof of the other material allegations in the bill (pages 64–143), and allege that the amended bill is inconsistent with the original bill and multifarious and that stock liability must be the subject matter of an independent suit (pages 180–186, 229–231).

On May 7, 1879, the cause was referred to the master in chancery to take proofs and report (page 156). The time for taking proofs was extended from time to time on motion of complainants and defendants alternately (pages 163, 168, 170, 171, 173, 179), and on November 1, 1882, the defendants asked and obtained 60 days' additional time to close their proofs (page 189), but defendants did not introduce any evidence before the master under this order of reference and the above extensions thereof, except that one stockholder, not an appellant herein, testified as to a transfer of his stock (pages 190, 191 *et seq.*); testimony in behalf of creditors had been taken from time to

time, and on January 19, 1883, the master reported the testimony to the court (pages 190–229). On May 30, 1883, the case was set for hearing upon the pleadings and proofs (page 231), and heard July 23, 1883 (pages 257–261, 261–264), the original complainants amending their bill of complaint by withdrawing the application for any priority over other creditors and stating unequivocally that the bill was brought for the common benefit of all (page 241), and the defendants having leave to answer said amendment (page 261), and thereupon setting up the statute of limitations to all claims (pages 241–254). Thereupon the court rendered an opinion (page 259), and in conformity thereto an interlocutory decree was entered (page 261) ascertaining the stockholders, setting aside certain stock transfers, and, the master not having made any findings with his previous report (pages 190–229), referring the case again to the master (pages 261–264), with specific instructions this time to take proof and report, first, the amount of the debts of said bank still unpaid, and the amount due each creditor thereof; second, the value of the assets, if any, of the bank; third, the amount of assessment necessary to be made on each share of the capital stock of said bank in order to fully pay the indebtedness of the bank, and the master was also directed to report the amount due and payable from each shareholder upon such assessment (pages 263, 264).

On April 18, 1884, complainants suggested the death of William H. Adams, one of the defendant stockholders, and by leave of court (page 268) filed a bill of revivor against his administrator, to which a demurrer was filed on the ground that stock liability does not survive (page 274), but the court rendered its opinion (page 276) overruling the demurrer (page 278). In like manner three other

bills of revivor were instituted against the personal representatives of three other deceased stockholders (pages 278, 283, 504).

On January 6, 1885, the master reported to the court the amount of the debts of the bank on November 1, 1884, and still unpaid to be $368,971.50 at the last mentioned date; the report also gave the name of each creditor and the amount due him, and that there were no assets of the bank outside of stock liability, and that the amount of assessment necessary to be made on each stockholder, naming him, was ninety per cent. of the par value of his stock. The master also classified the respective claims into class A for clerical services to the bank amounting to $183.31; class B, for some past services of the receiver and his attorneys, aggregating $4,437.04; class C, for claims arising before the failure of the bank, and upon which no collaterals were taken, aggregating $170,231.81; and class D, for claims also arising before the failure of the bank, but upon which worthless collaterals were subsequently received, this class aggregating $185,119.34. (page 290). The evidence already before the master was re-introduced by stipulation, and also some additional evidence taken for creditors and one witness examined for the defendants, and all the evidence was returned by the master with his report (pages 285-424). Part of this evidence, consisting of the bank stock book, ledgers and record book, appear in the last few pages of the transcript of record (pages 513-521).

Exceptions to the report were filed by the defendants, asserting that the stock transfers were valid; that the statute of limitations barred all creditors, except the Irons estate and Joseph Shugart; that notes transferred after

the bank's insolvency, were given in payment of claims, and not as collateral security; that the expenses of the receivership should not be included in the assessment, and that the claims were computed at too high a figure. (pages 475–486.) These exceptions were taken under advisement and overruled, except that a re-computation of interest was directed (page 487), by an order for the master to scale down interest to a uniform rate of six per cent. per annum upon the indebtedness of the bank at the time of its failure and still unpaid (some indebtedness having been theretofore reckoned on a basis of eight or ten per cent.; as provided in the collaterals given to secure it), and the master was directed to ascertain the necessary assessment to pay the bank's indebtedness, reckoning interest at the reduced rate and including the expenses of the receivership. (page 487.) Under this order the master reported $416,079.11 to be due, being eighty-three and two-tenths per cent. on the capital stock of $500,000. (Page 487.)

The case coming up for final hearing June 1, 1886, the court rendered its opinion (page 491) and entered a final decree (page 496) accordingly, entering separate money decrees or judgments against each of the four stockholders who have appealed to this court, and against other stockholders.

The opinions of the Circuit court upon the various questions arising in the case are incorporated into the record. (pages 254, 276, 491.)

Brief for Appellees.

I.

Bill properly amended to enforce stock liability and not multifarious.

Daniels Ch. Pl. & Pr., Vol. I, 4th Ed., Sec. 1, p. 190, also p. 235.

Ogden v. *Thornton*, 30 N. J. Eq., 573.

Hill v. *Filkin*, 2 P. Wms., 12.

Pollard v. *Bailey*, 20 Wall., 521.

1 Daniels Ch. Pl. & Pr., Sec. 1, p. 235.

Harner v. *Henning*, 93 U. S., 228.

Patterson v. *Lynde*, 112 Ill., 196.

Bank v. *Kennedy*, 17 Wall., 19.

Casey v. *Galli*, 92 U. S., 512.

1 Daniels Ch. Pl. & Pr., Sec. 8, p. 401, p. 245.

Pennell v. *Lamar Ins. Co.*, 73 Ill., 303.

Derrick v. *Lamar Ins. Co.*, 74 Ill., 404.

Battle v. *The Mutual Life*, 10 Blatchf., 417.

Harper v. *Union Mfg. Co.*, 100 Ill., 225.

Moore v. *Reynolds*, 109 Mass., 473.

Atlas Bank v. *Nahant Bank*, 23 Pick., 480.

1 Daniels Ch. Pl. & Pr., Sec. 4, p. 341, and note 4 thereunder.

Brinkerhoff v. *Brown*, 6 Johns. Ch., 151.

Hallett v. *Davis*, 2 Page Ch., 19.

Thompson v. *Brown*, 4 Johns. Ch., 637.

Morgan v. *N. Y., etc., R. R.*, 10 Page's Ch., 291.

McDougald v. *Dougherty*, 14 Georgia, 674.
Hewett v. *Adams et al.*, 50 Maine, 271.
Sup. to U. S. Rev. Stat., Cap. 156, Sec. 2, Vol. I, p. 217.
Larkin v. *Saffarans*, Fed. Rep., March 20, 1883, p. 147.
Harvey v. *Lord*, 10 Fed. Rep., 236.
Story's Eq. Pl., 336.
Mix v. *Beach*, 46 Ill., 311.
Planter's Bank v. *Sharp*, 16 How., 327.
Brownson v. *Kinzie*, 1 How., 316.

II.

PROOF OF DEBTS.

Ill. Rev. Stat., Cap. 98, Sec. 7.
Camden v. *McKoy*, 4 Ill. (3 Scam.), 437.
Rich v. *Hathaway*, 18 Ill., 548.
Nat. Bank Act, Sec. 5,136.
Nat. Bank v. *Matthews*, 98 U. S., 621, 625.
People's Bank v. *Nat. Bank*, 101 U. S., 181.
Nat. Bank Act, Sec. 5,151.
Slee v. *Bloom*, 20 Johns., *669, *684.
Donworth v. *Coolbaugh*, 5 Iowa, 300, 304.
Wilson v. *Stockholders*, 43 Pa. Stat., 424, 427.
Bank v. *Ins. Co.*, 104 U. S., 54.
Webster's Dict., Title Liquidate.
Ill. Rev. Stat., Cap. 74, Interest, Sec. 3.
Worcester's Dict., Title Liquidate.
Bouvier's Law Dict., Idem.
U. S. v. *State Bank*, 96 U. S., 30, 36.
Nat. Bank Act, Secs. 5,220, 5,221.

III.

INTEREST RUNS ON DEBTS OF THE BANK.

In re Haake, 7 Nat. Bankruptcy Reg., 61.
In re Strachan, 4 Legal News, 145, 146.
Brown v. *Lamb*, 6 Metc., 203.
Atlas Bank v. *Nahant Bank*, 3 Metc., 581.
Nat. Bank v. *Mechanics' Nat. Bank*, 94 U. S., 437, 439.
Chemical Nat. Bank v. *Bailey*, 12 Blatchf., 480.

IV.

THE STATUTE OF LIMITATIONS IS NOT A BAR, AND HEREIN OF VOLUNTARY LIQUIDATION BEING A WAIVER OF THE STATUTE.

Nat. Bank Act, 1876, Sec. 2.
Derrick v. *Lamar Ins. Co.*, 74 Ill., 404.
Pennell v. *Lamar Ins. Co.*, 73 Ill., 303.
1 Chitty's Pl., *546.
Webb v. *Martin*, 1 Levinz, *48.
Perkins v. *Burbank*, 2 Mass., 81.
Barders v. *Murphy*, 78 Ill., 81, 87.
Desty's Fed. Proc., Equity, rule 45, p. 290.
Clements v. *Moore*, 6 Wall., 299.
Hurd v. *Ascherman*, 117 Ill., 501; advance sheets.
Scovil v. *Thayer*, 105 U. S., 143, 156.
Bowden v. *Johnson*, 107 U. S., 251, 263.
Nat. Bank Act, Sec. 5,234.
Phillippi v. *Phillippe*, 115 U. S., 151.

Oliver v. *Piatt*, 3 Howard, 333.
Henry County v. *Winnebago Company*, 52 Ill., 300, 301.
Nat. Bank Act, Sec. 5,151.
Sawyer v. *Hoag*, 17 Wall., 263.
Ill. Rev. Stat., Cap. Limitations, Sec. 16.
Harvey v. *Lord*, 10 Fed. Rep., 236.

V.

STOCK TRANSFERS WERE INVALID.

Sawyer v. *Hoag*, 17 Wall., 610.
First Nat. Bk. v. *Smith*, 65 Ill., 44.
Wheelock v. *Kost*, 77 Ill., 296.
Brown v. *Adams*, 5 Biss., 181.
Hale v. *Walker*, 31 Iowa, 344.
Bowden v. *Farmers' Bank*, 1 Hughes (U. S. Cir.), 307.
Adderly v. *Storm*, 6 Hill, 624.
Thompson's Liability of Stockholders, Sec. 217.
Nat. Bk. v. *Case*, 99 U. S., 628.
Nathan v. *Whitlock*, 9 Paige, 152.
Bowden v. *Santos*, 1 Hughes, 158.
Thompson's Liability of Stockholders, Secs. 211, 215.
Johnson v. *Laflin* (by Dillon, J.), 6 Cent. Law Jour., 161.
2 Kent's Com., 389.
Wager v. *Hall*, 16 Wall., 599.
Bowden v. *Johnson*, 107 U. S., 251.
Whitney v. *Butler*, U. S. Sup. Ct., Oct., 1886.

VI.

STOCK LIABILITY SURVIVES AGAINST THE ESTATE OF A DECEASED SHAREHOLDER.

Nat. Bank Act, Sec. 5,152.

N. E. Bank v. *Stockholders*, 6 R. I., 154.

Deming v. *Bull*, 10 Conn., 469.

Davis v. *Weed*, 44 Conn., 569, 581.

Hobbal v. *Western Nat. Bk.*, 9 Rep., 467. (U. S. Cir., Eastern District Pa.)

Davis, receiver, v. *Stevens, executor*, 17 Blatchf., 259, 261, 263.

Laking, administrator, v. *Burley, receiver*, 101 Ill., 591, 593.

Houldsworth v. *Evans*, L. R. House of Lords, Eng. and Irish Appeals, 263, 283.

Blakesley's Case, 13 Beav.

25 and 26 Victoria, c. 89.

30 and 31 Victoria, c. 131.

Boston Glass Co. v. *Langdon*, 24 Pick., 49, 52.

Russell v. *McLellan*, 14 Pick., 63, 69.

Hutchins v. *State Bank*, 12 Metc., 421.

Crew v. *Breed*, 10 Metc., 569, 576.

Hawthorn v. *Calif*, 2 Wall., 10.

VII.

THE EXPENSES OF THE RECEIVERSHIP SHOULD BE INCLUDED IN THE ASSESSMENT ON STOCKHOLDERS.

Nat. Bk. Act, Secs. 5,238, 5,205.
Irons v. *Mnfrs. Nat. Bk.*, 21 Fed. Rep., 196.
Morrison v. *Price*, 23 Fed. Rep., 217, 221.

VIII.

THE PROPER DECREE IN VIEW OF THE FOREGOING HEADS OF THIS ARGUMENT.

Kennedy v. *Gibson*, 8 Wall., 498.
Castleman v. *Homes*, 4 J. J. Marshal, 5.
Ogilvie v. *Knox Ins. Co.*, 22 Howard, 380, § 5,154 Nat. Bk. Acct.
Bayley v. *Sawyer*, 9 Legal News, 191.
McConn v. *Delaney*, 2 Bibb., 440.
Royals, Admrs. v. *Johnson*, 1 Randolph, 421.
Munger v. *Jacobson*, 99 Ill., 349.

ARGUMENT.

I.

THERE WAS NO ERROR IN ALLOWING THE ORIGINAL BILL TO BE AMENDED FOR THE PURPOSE OF ENFORCING THE LIABILITY OF THE STOCKHOLDERS OR IN ALLOWING THE SUBSEQUENT AMENDMENT THERETO, NOR WAS THE BILL AS AMENDED MULTIFARIOUS.

The original bill in this case was in form a creditor's bill against the Manufacturers' National Bank and its president, and was filed on the 3d day of February, 1875. Prior to the filing of this bill, and on the 23d or 26th day of September, the bank suspended business and went into voluntary liquidation, and the business of liquidating the debts of the bank was conducted by Holmes, the president, until the appointment of the receiver by the court under the prayer of the original bill on the 26th of February, 1875. After the appointment of the receiver, which was contested by the president of the bank, and on the 1st day of April, 1875, Holmes answered the bill for himself and the bank, when it was disclosed that the assets of the bank had all been disposed of in the process of liquidation, with the exception of $116,000 of bills receivable and $66,000 of bonds and stocks, which the answer alleged to be *nearly* if not wholly worthless. (Rec., 21, 22.) The receiver, from the assets turned over to him on his appointment, realized sufficient to pay some of the minor expenses of this litigation; but nothing from which a dividend could be declared in favor of any creditor; on

the appointment of the receiver and the coming in of the answer, it was ascertained that the creditors of the bank must look to the stockholders' liability for payment of their claims, and thereupon the amended bill was filed, a motion was made by some of the counsel of the respective defendants to strike this bill from the files, while others filed demurrers. These motions and demurrers were overruled and defendants ruled to answer within the time ordered by the court.

The contention below was, and it is renewed here:

1st. That amended bill made a new case, introduced new parties and a different cause of action from that stated in the original bill, and was therefore erroneously allowed.

2d. That said bill did not purport to be a bill on behalf of the complainant and other creditors, and hence was obnoxious to demurrer; and

3d. That the amended bill was multifarious.

As we have seen, at the time when the amended bill was filed there was no way of paying the unsettled debts of this defunct bank, except by resorting to the liability of the stockholders. The original bill had demonstrated the liquidation proceedings to be a failure. The assets were exhausted, and there was no provision in the banking law for an assessment on the stockholders to pay debts which the bank in liquidation had failed to liquidate. In the absence therefore of a legal or equitable remedy, the creditors were apparently helpless, and the means created by the act for their protection incapable of enforcement; such, however, was not the case, and regardless of the enactment of June 30, 1876, in which it was provided that any creditor of a national bank in

liquidation might file a bill in the nature of a creditors' bill on his own behalf and all the other creditors for the enforcement of the liability of the stockholders, courts had assumed jurisdiction of cases of this character, and furnished the relief which the law creating the liability had failed to provide, and the state of the law at this time was such that one creditor might file a bill on his own behalf with a prayer for the benefit of himself and the other creditors, and if the scope of the bill and the prayer thereof were such that the other creditors might become participants in the fund recovered, the object of the law was fully met, and the absence of the recital that the bill is on behalf of all the other creditors as well as himself, immaterial. Equity does not look at the form, but rather the substance of the case, and the constant aim of the court is to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.

Daniels Ch., P. & P., Vol. 1, 4 Ed., Sec. 1, p. 190, also p. 235.
Ogden v. *Thornton*, 30 N. J. Eq., 573.
Hill v. *Filkin*, 2 P., Williams 12.

While the liability of the stockholders of associations organized under the national banking act is individual, it is also equally and ratably and not one for the other, and for *all contracts, debts* and *engagements* of the association to the extent of the amount of the stock at the par value thereof, etc. *Revised Statutes*, 1874, Sec. 5,151. The liability, therefore, being for the benefit of *all*, it follows that it was never intended that one creditor should

obtain any advantage over another, and this could only be avoided upon an accounting in equity for the purpose of ascertaining the amount of indebtedness, and apportioning the assessment to be made on the stockholders, hence it was held by this court in *Casey* v. *Galli*, that when the assessment by the comptroller's receiver was *equal* to the *par value* of the stock, the suit to collect must be at law, otherwise it must be in equity.

In that case an accounting was not necessary, as the recovery was for an amount equal to the par value of the stock, and all the stockholders were liable, but, in the case at bar, it is for less, and an accounting was indispensable, and the proceedings therefore necessarily in equity.

In the case of *Carroll* v. *Greene*, 92 U. S., p. 512, the court says: "Stockholders in such cases are liable ac-"cording to the plain meaning of the terms employed by "the legislature and not otherwise." "*The section is silent* "*as to a preference to any class of creditors. All there-*"*fore stand upon a footing of equality and were entitled to* "*share alike in the proceeds of the litigation.*" *The remedy against the stockholders was necessarily in equity.*

Pollard v. *Bailey*, 20 Wall., 521.
Daniels Chancery P. & P., Sec. 1, p. 235.
Horner v. *Henning*, 93 U. S., 228, Vol. 1.
Patterson et al., v. *Lynde et al.*, 112 Ill., 196.

Without reference to the adjudged cases of other courts on this question, it may be said to be the rule in this court that in the absence of an express preference to any class of creditors by the statute creating the liability, the remedy for its enforcement must be in equity, and there is no apparent reason why this rule should not be

applicable to the liability of stockholders created by the the national banking act to the same extent as in other cases where there is no preference given to any class of creditors, and no remedy for its enforcement provided for. The liability of stockholders in associations organized unthe national banking act is conditional only for the payment of the debts after all the ordinary resources of the bank have been exhausted.

Bank v. *Kennedy*, 17 Wall., 19.
Casey v. *Galli*, 92 U. S., 512.

When, therefore, it was ascertained that the bank had no resources with which to meet the outstanding debts, the liability of the stockholders at once attached, *and by operation of law became a trust fund*, from which payment could be made, but unavailable until the amount of the bank's indebtedness had been ascertained and the amount of the assessments to be made on the stockholders determined. When once this liability had attached, the fund to be derived therefrom was as much a trust fund for the benefit of the creditors as the stock subscriptions or the assets of the bank, and the only question was how was it to be made available to the creditors?

Now, while it is true that the original bill was in form a creditor's bill, still it is apprehended that there can be no question about the power of the court to allow amendments to that bill by making new parties and allegations and inserting new matter for the purpose of showing the necessity for the amendment and to advise the parties in the case what they were required to meet.

Daniels, Chancery P. & P., Sec. 8, p. 401, p. 245.

And it follows, as a matter of course, if the bill may

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Daniels, Chancery P. & P., Sec. 8, p. 401, p. 245.

And it follows, as a matter of course, if the bill may

be so amended, that the prayer may also be likewise amended so as to enable the court to grant the relief warranted by the allegations of the amended bill. The form of the pleadings is immaterial if the case made by the proofs justify the relief prayed, and so it has been held that upon an ordinary creditor's bill, filed by two judgment creditors of an insolvent insurance company to collect their debt, an assessment might be made on the stockholders of the company sufficient to pay its debts, and that such fund after paying the complainants inured to the benefit of all the creditors.

Pennell v. *Lamar Ins. Co.*, 73 Ill., 303.
Derrick v. *Lamar Ins. Co.*, 74 Ill., 404.

In that case Pennell was not a party to the proceeding, except as he became such by proof and allowance of his claim before the master. Exceptions were taken to the master's report allowing the claim, and sustained by the court below. Pennell appealed, and the court says: "It "is next urged that the *creditor's bill* did not inure to "the benefit of appellant, but only to those who came "into court and by leave became complainants to the bill. "The extent to which creditor's bills have been passed "on in this court seems to have been to remove clouds "from title in aid of an execution at law, and not in cases "where the entire fund is in possession of the court, and "held for the benefit of all the creditors of the defend-"ant." (page 307 of the Pennell case.)

It further appears that it was not the allegations of the bill which gave to Pennell and other creditors the right to prove their claims and share in the fund, but the decree which among other things provided "that out of the "proceeds which should come into the hands of the re-

" ceiver he pay first the costs of the proceeding in collect-
" ing the money, then the complainants or their solicitors,
" and to all creditors of the said Lamar Insurance Com-
" pany, who shall *come in and file their claims under this*
" *decree pro rata* or share and share alike until all the de-
" mands against and liabilities of the said corporation
" shall be paid in full."

We have then in this case a bill not in the *nature of a creditor's bill*, but in fact a creditor's bill in form, upon which the court enters a decree not only for the benefit of the complainants therein, but all the creditors who might come in and prove their claim before the master, and this decree is entered regardless of the fact that the bill does not in form purport to be a proceeding *on behalf of the complainants, and all the other creditors of the company*, the court utterly disregarding the form and looking only to the substance of the object to be attained.

It cannot be successfully contended but that the court in that case might have permitted the complainants or ordered them of its own motion to amend the bill, so as to conform to the findings of the decree, but this was obviously deemed superfluous and useless, as the only object was to collect the fund and distribute it *pro rata* among the creditors of the company.

If the court in that case had the power under a creditor's bill in form to order an assessment against the stockholders of the company without making them parties, as appears to have been done, it would seem to follow that the court in the case at bar had the power to permit the bill to be amended so as to enforce the stockholders' liability by an assessment on the stockholders for the purpose of payment of the debts of the bank, and it is

wholly immaterial that it failed to recite that it was brought on behalf of the complainant, and all the other creditors of the bank. The prayer clearly indicated that such was the case (Rec., 33 and 34), and even if this were not so, the bill by operation of the statute became a bill for the benefit of the complainant and all the other creditors, and inured to their benefit to the same extent and with the same force as though it had contained a recital to that effect. The stockholders were all before the court and were advised of the case they were required to meet. They knew the object and scope of the bill, as amended, was to satisfy the unpaid debts of the bank out of the liability raised in favor of the creditors and against the stockholders by the statute, and therefore were not and could not in any way be prejudiced by the absence of the recital that the bill was filed for the benefit of all the creditors.

With the stockholders before the court it could have entered a decree like the one in *Pennell* v. *Lamar Ins. Co.*, *supra*, without any further amendment to the bill, and it is no answer to this position to say that where a remedy is conferred by statute it must be strictly followed, for the obvious reasons:

1st. That the remedy furnished by the amendment to the banking act of June 30, 1876, was simply declaratory of the law as it previously existed.

2d. That it did not therefore provide any new or unknown remedy; and,

3d. That the stockholders were all before the court, and were fully advised of the nature and object of the suit, and could not be prejudiced by the absence of the recital specified in the act.

It is unquestionably true that when a bill is amended by the introduction of new parties and new matter, neither the former parties nor the new ones will be bound without notice, and a hearing, or the opportunity of being heard, and this would seem to be all that can be claimed for the ruling in *Smith* v. *Woolfolk*, 115 U. S. R., 148, and kindred cases. This rule is not in conflict with the power of the court to allow or order amendments to the pleadings in suits of this character where the parties are all before the court, and especially is this the fact where the amendment, as in the case at bar, is one of form, and not of substance; and whether the amendment be a matter of form, or one that should be made in order to give effect to the pleading and empower the court to grant the relief sought, the rule seems to be that "the court will generally, at the hearing, allow "a bill which has been filed by one individual of a *numerous class in his own right*, to be amended so as to "make such individual *sue on behalf of himself and the rest of the class*."

Daniels Ch. Pl. & Pr., Vol. 1, Sec. 1, p. 245.

It further follows, therefore, as an irresistible conclusion, that if a bill of this nature may be amended on the hearing, that the power rests in the sound discretion of the court, and where all the parties liable to be in any way prejudiced thereby are before the court so as to be fully protected by the decree entered therein, the exercise of this discretion cannot be questioned.

The object, after all, is the attainment of justice, and not its defeat by the enforcement of technical rules of pleading; and while it is true that equity follows the law,

it is the principle of law which controls the merits of the case, and not rules of pleadings, which, as will be seen, in courts of equity are made to conform to the case made by the proofs, even to the substitution of an entirely new set of pleadings.

In the case of *Neal* v. *Neales*, 9 Wall., 1, 8, DAVIS, J., says: "It would seem clear from the manner in which the "court below, on its own motion, and without assigning "any reasons for this action, gave the complainants leave "to amend their bill, that on the original hearing it was "satisfied that the evidence made out a case for relief, "but a case different from the one stated in the bill; and "that, as the pleadings must correspond with the evi- "dence, it was necessary either to dismiss the bill with- "out prejudice, or to give the leave to amend. The "court adopted the latter alternative, doubtless with a "view to save expense to the parties, and because such a "course could not, by any possibility, work any harm to "the defendant.

"It is insisted that this proceeding was erroneous; that "after a cause had been heard, the power of allowing "amendments ceases; or, if it exists at all, it cannot go so "far as to authorize a plaintiff to change the *framework* of "his bill, *and make an entirely new case*, athough on the "same subject matter, as, it is contended, was done in this "instance under the leave to amend.

"This doctrine would deny to a court of equity the "power to grant amendments after the cause was heard, "and before decree was passed, no matter how manifest "it was that the purposes of substantial justice required "it, and would, if sanctioned, frequently embarrass the "court in its efforts to adjust the proper mode and meas- "ure of relief. To accomplish the object for which a

"court of equity was created, it has the power to adapt "its proceedings to the exigencies of each particular case; "but this power would very often be ineffectual for the "purpose, unless it also possessed the additional power, "after a cause was heard and a case for relief made out, "but not the case disclosed by the bill, to allow an altera- "tion of the pleadings on terms that the party not in fault "would have no reasonable ground to object to. That "the court has this power and can, upon hearing the "cause, if unable to do complete justice, by reason of de- "fective pleadings, permit amendments both of bills and "answers, is sustained by the authorities."

In the case of *Battle* v. *The Mutual Life Insurance Company*, 10 Blatch., 417, BLATCHFORD, J., after stating the scope and purpose of the proposed amendments to the bill in that case, referring to the case of *Neal* v. *Neales*, *supra*, in support of the ruling of the court in allowing the amendments, on page 426, says: "That the court "has this power and can, upon hearing the cause, if un- "able to do complete justice by reason of defective plead- "ings, permit amendments, both of bills and answers, is "sustained by the authorities. Necessarily, in a federal "tribunal, the matter of amendment, at this stage of the "progress of a cause, rests in the sound discretion of the "court. At an earlier stage, this discretion is controlled "by the rules of equity practice adopted by this court, "but not so upon the hearing, for there is no rule on the "subject of amendments, applicable to a cause which has "advanced to this point. As, therefore, the leave to "amend, in this instance, was within the discretion of the "court, we will proceed to dispose of the case on its "merits. *It is unnecessary, in the view we have taken of* "*the power of the court over amendments at the hearing,*

"*to discuss the question whether the amended bill is* "*materially different from the original bill. It is enough* "*to know, if different, that the subject matter of both bills* "*is the same*, and that the contract, consideration, promise "and acts of part performance, stated in the amended bill, "are stated with sufficieat precision, and, if supported by "proof, entitle the complainants to the relief which they "seek at the hands of a court of equity." The court then, on the merits, affirm the decree.

It is apparent, therefore, that whatever defects there may have been in the pleadings in the case now under consideration at the time of the hearing, on becoming satisfied that all the parties interested were before the court, and that the proofs made out a case against the defendants, the chancellor had the power to order the pleadings amended so as to enable the court to grant the relief which the proofs showed the creditors to be entitled to, and this was thereupon done (Rec., 241). It is said, however, that this action of the court was erroneous, and it is argued that it worked a great hardship on the defendant stockholders. Of the cases cited in support of this contention, and which may be said to be a fair example of the rulings of other courts on the subject, are *Harper* v. *Union Mfg. Co.*, 100 Ill., 225, and *Moore* v. *Reynolds*, 109 Mass., 473.

In both these cases the bills failed to aver that they were brought by the creditor on his own behalf, and on behalf of all the other creditors, and they were dismissed for the reason that the parties *refused to amend*. The same criticism may be made in respect of the other cases cited on this question, but in no case, however, was an amendment disallowed or the bill dismissed after it had been made. The case of *Shields et al.* v. *Barrows*, 17

Howard, 143, is not in conflict with this principle or with *Neal* v. *Neales*, *supra*, for the obvious reason that the bill in that case as amended, "not only presented two "aspects, but two diametrically opposite prayers for re- "lief, *resting upon necessarily inconsistent cases.*" There can be no pretense that the amended bill in this case, either before or after the amendment under the order of the court, presented any such aspect. The object and scope of the bill was the collection of the liability of the stockholders, and the prayer was for an accounting, etc., and its distribution among the creditors of the bank *pro rata*. The bill had but one purpose, and the prayer was not inconsistent with that purpose.

But it is said the amended bill is multifarious. As we have seen it is now the settled law of this court that a proceeding in equity, under certain contingencies, is the only mode by which the individual liability of stockholders of corporations of this character can be enforced, and under the amendment to the banking act of June 30, 1876. A bill in the nature of a creditor's bill was certainly a legalized mode of enforcing this liability, before and after the amendment of June 30, 1876, and necessarily involved a variety of parties and a diversity of interests; to assume that such a bill is or could be multifarious requires a strength of the imagination and an insight and knowledge of chancery procedures which we candidly confess we do not possess.

It is sufficient to say that the amended bill, if a proper proceeding, is not and could not be multifarious.

In the case of *Atlas Bank* v. *The Nahant Bank*, 23 Pick., 480, and which was a statutory proceeding in many respects similar to the one under consideration, and insti-

tuted by one creditor, on page 491, the court says: "It "is said that this is not a proceeding in behalf of all "creditors, and that all creditors are not bound to come "in nor bound by the process, but have other remedies "against the corporation and against the stockholders. "*We think this substantially a proceeding in behalf "of all creditors, because all are entitled to a dividend,* "and because it provides for an administration of "all the assets. It is true that they are not bound to "prove their debts and take a dividend, because it is a "privilege they may waive, and the remedy against the "corporation, if it remains nominally, would be of little "value after the corporation has expired and all its effects "have been disposed of. As to the statute remedy against "the individual stockholder, it is independent and col- "lateral, like the remedy against a surety, and does not "affect the question."

And again, on page 492, the court uses the following language:

"It is said, that if these attachments are dissolved, the "plaintiffs may dismiss their bill, and then, by a new pro- "cess, attach the same property themselves. But we do "not so consider it. The plaintiffs having once instituted "the proceedings as a statute remedy for themselves and "others, they go on afterwards for the benefit of all par- "ties concerned, and the original complainants have no "power to discontinue, any more than a petitioning "creditor could discontinue the proceedings under a com- "mission of bankruptcy."

Like the bill in the case at bar, that was *necessarily* a proceeding for the benefit of all the creditors of the insolvent bank, made so by a statute, although commenced

by one, and such a proceeding could not therefore by any possibility be multifarious.

It is observed by Mr. Daniels, in his work on Chan. Pr. Pl.: "That this objection will only apply when a "plaintiff claims several matters of different natures by "the same bill; and that where a *general right* only is "claimed by the bill, though the defendants have separate "and distinct interests, a demurrer will not hold."

Daniels, Ch. Pl. and Pr., Vol. 1, Sec. 4, page 341, and cases cited in Note 4.
Brinkerhoff v. *Brown*, 6 Johns., Ch. P., 151.
Hallett v. *Davis*, 2 Page, Ch: 19.
Thompson v. *Brown*, 4 Johns., Ch. P. 637.

In this last case the chancellor in commenting upon the opinion of Lord Hardwicke, in *Martin* v. *Martin*, 1 Vesey, 211, reaches the conclusion, that a suit by one creditor against an heir, and a decree for the sale of the assets descended, will *inure* for the benefit of all the creditors, and draw the entire distribution of the fund into this court. The only question in such a case seems to be the nature of the fund to be collected and distributed, and if it be such that parties other than the complainants in the bill upon which the relief is sought are entitled to participate, or that its collection involves a number of parties, it follows that all such should be brought before the court, and it would seem that a bill, the tendency of which is to accomplish this result, cannot be obnoxious to a demurrer for multifariousness or misjoinder of parties.

It is, moreover, apparent that the principle laid down in that case is equally applicable to any other where the dis-

tribution involves a fund in which different creditors are entitled to participate. In such a case a bill filed by one or more creditors in his or their behalf will inure to the benefit of all as a matter of right, and such a bill before or on the hearing may be so amended as to protect the equities of all.

Indeed, the original bill has a prayer for general relief (page 7), and contains a direct statement of the amount of capital stock, the names of shareholders, and the number of shares held by each (pages 6, 8), showing that even in the original bill the pleader had in view the subject of stock liability. This is clearly recognized in the answer of the two original defendants, the bank and Ira Holmes, for they set up in their answer certain defences of individual stockholders (page 22). True, the subject of stock liability was inartificially expressed in the original bill, the averments being hardly sufficient to support a decree against the stockholders, and they not being brought in by process until subsequently. There was sufficient to amend by, however, and obviously the pleader's proper course was that which he actually pursued. He obtained leave to amend, and made specific allegations and prayer for the enforcement of stock liability. In the following cases stockholders were not made defendants to the original bill, but were allowed to be made defendants by amendment:

Morgan v. *N. Y., etc., R. R.*, 10 Paige's Ch., 291.

McDougald v. *Dougherty*, 14 Georgia, 674.

Hewitt v. *Adams et al.*, 50 Maine, 271.

The act of June 30, 1876, expressly authorizes the en-

forcement of stock liability in a proceeding of this character, in the nature of a creditor's bill.

Supp. to U. S. Rev. Stat., Cap. 156, Sec. 2, Vol. I, p. 217.

The bank failed in 1873. This statute did not, however, increase the stockholders' liability, for that would be impairing the obligation of contracts; it leaves the liability unchanged, being for the same amount and the same class of claims, the debts against the bank. The liability of stockholders in national banks, over and above the amount invested in their shares, was established in the original banking act, and has never been repealed. We have heretofore shown that the act of June 30, 1876, is merely declaratory of a pre-existing power in courts of equity, but even if the statute gave anything new, it merely gave a new form of procedure.

This, then, belongs to the remedy and does not affect the right. But remedial statutes are liberally construed, so as to cover a pre-existing state of facts, even where they do not expressly say so.

Larkin v. *Saffarans*, Fed. Rep., March 20, 1883, p. 147.

The case at bar is stronger, however, because the express language of the act covers a pre-existing state of facts. We quote from the statute itself: "When any "national banking association *shall have gone* into liquida- "tion" under the provision for voluntary liquidation, the shareholders' individual liability may be enforced by bill in equity, in the nature of a creditor's bill. The words which we have put in italics necessarily include the past.

If that time were meant to be excluded, the language of the act would be: "When any national banking associa-" tion *shall hereafter go* into voluntary liquidation." We refer to a case directly in point:

"After the filing of the original Irons bill, the powers "of the court, under such a bill, were materially en-" larged by the act of Congress just quoted; that bill was " pending when this law took effect, and Irons undoubt-" edly had the right by amendment to make a case, which " would enable the court to administer those enlarged " powers, with which it had been clothed, *pendente lite*. " * * * It seems to me there is no room to doubt " that this stockholders' liability can be completely en-" forced in the Irons case."

Harvey v. *Lord*, 10 Fed. Rep., 236.
Story's Eq. Pl., 336.
Mix v. *Beach*, 46 Ill., 311.
Planters Bank v. *Sharpe*, 16 How., 327.
Bronson v. *Kinzie*, 1 How., 316.

II.

PROOF OF DEBTS.

Let us now examine the proof as to the debts of the bank. The evidence shows that these debts are of four kinds and they have been classified accordingly by the master (p. 200). The first class is simply one item of salary due George R. Quinn, as the bank's book-keeper, proved by the uncontradicted testimony of the claimant (p. 194). Then come claims of the receiver and his attorneys for unpaid services up to March 30, 1880, namely,

the receiver, $1,294.59; Mattocks and Mason, $1,416.95; Gardner and Schuyler, $1,725.50; these amounts being in addition to some $2,500 paid in cash to the receiver and his attorneys out of other assets than stock liability, (pp. 163, 173), making a total sum of about $7,900 asked up to that time for the expenses of the receivership. The petition of the receiver (p. 173) avers a laborious investigation of all the accounts of the bank and that no allowance had been made, up to that time, for clerk hire or rent, and he also submits a bill from one firm of his attorneys (p. 174) and an itemized statement from the other firm (p. 175). The date of the receiver's petition shows that the receiver had then held the position seven years (pp. 15, 173). Under reference to the master these claims were examined and approved by him, and were then allowed by the court as costs in the case (p. 177). No exception appears to this report and no motion to vacate the order. If the appellants depied that the services were worth the sums allowed, they should at least have preserved in the record the report of the master with the evidence returned by him, for it appears from the order that such report was made (p. 177), but they have not done so and cannot take advantage of their own neglect. Yet the receiver's evidence has been preserved, taken at an earlier date and in another connection, but, nevertheless, showing that he had been administering the affairs of the bank for over four years (p. 196) and had made a detailed investigation of its books and papers (p. 201). Furthermore, the whole transcript of record up to the date of this allowance is evidence of important, laborious and protracted services of the receiver and his attorneys, in obtaining the appointment of the receiver, shaping the pleadings, getting the defendants into court, arguing de-

murrers, pleas and motions, and taking testimony in the cause. Thus the justice and moderation of these expenses of the receivership stand unimpeached. The subject whether any expenses of the receivership, however meritorious in themselves, can be included in an assessment on stockholders is treated under the seventh head of this argument.

The third class of claims embraces those arising before the failure of the bank, and upon which no collaterals were taken, while the fourth class embraces those also arising before the failure of the bank, but upon which worthless collaterals were subsequently received. Both classes are based upon deposits in the bank prior to its failure and prior to any transfers of its stock, and amount, not including interest, to some $190,000 (page 488). They are proved by the production of the books of the bank, showing such indebtedness at the time of its failure. Of the above amount, some claims have not changed their form up to the present time; the books of the bank still show them to be unpaid deposits; the claim of the Iowa County Bank is a sample of this class (page 320.) Other claims have simply been reduced to judgment against the bank; for instance, the Irons claim (page 320); certified transcripts of the judgments, as well as the bank accounts, have been introduced in evidence (pages 201 322). Upon many of the claims, the creditors received worthless notes of third parties, guaranteed or indorsed by the bank, or purporting so to be, and the notes being unpaid, the creditors come upon the bank and the stockholders of the bank (pages 371 408). Due diligence was used by the creditors to realize upon these notes. In the case of an indorsed note, we have shown the insolvency of the original makers at the time of

the maturity of their paper, which fact, under the laws of Illinois, excuses suit against the maker, and makes the indorser responsible:

"Every assignor * * * of every such note, bond, "bill or other instrument in writing shall be liable to the "action of the assignee thereof, if such assignee shall "have used due diligence by the institution and prosecu- "tion of a suit against the maker thereof * * * for "the recovery of the money or property due thereon or "damages in lieu thereof; provided that if the institution of "such suit would have been unavailing * * * when "such instrument became due, such assignee * * * "may recover against the assignor * * * as if due "diligence by suit had been used."

Ill. Rev. Stat. on negotiable instruments, Cap. 98, Sec. 7.

Under this provision, insolvency of the maker excuses suit against him.

Pierce v. *Short*, 14 Ill., 146.

In the case at bar, the makers of the indorsed paper are Ira Holmes, Henry E. Pickett, Byron Philpot and Brainerd T. Smith. Ira Holmes' insolvency is proved by himself (page 218); Pickett's insolvency by the witness McCoy (page 314); Philpot's and Smith's insolvency by unsatisfied judgments and executions in suits recovered against them at the next term of court after the maturity of their paper (page 313). The S. J. Walker paper (page 307) is really guaranteed by the bank, because it is drawn payable to the order of the maker and indorsed by the maker, while the bank's signature appears above the maker's indorsement, which position of

the bank's signature, not being necessary for a transfer of the paper, is presumptive evidence by the law of Illinois of a guaranty rather than an indorsement,

Camden v. *McKoy*, 4 Ill. (3 Scam.), 437.

and therefore would not require any diligence against Walker to hold the bank.

Rich v. *Hathaway*, 18 Ill., 548.

But even if the bank were an indorser on Walker's paper, suit against him is excused by the fact of his insolvency, proved by an unsatisfied judgment and execution against him (page 303) and by the testimony of a witness (page 316).

It is said in behalf of appellants that some of the notes turned out to creditors of the bank were secured on real estate, but appellant's one witness gives a sample of the kind of security: a piece of land would be bought on speculation for $50,000, ten per cent. paid in cash and ninety per cent. secured on the property; this ninety per cent would be turned over to the creditors of the bank as good, secured paper. Conservative investors, who demand a margin of fifty per cent. on their real estate loans, will be aghast at such security as this. Worse remains to be told: In some instances, third parties held a first mortgage of $10,000 on such property, the bank holding $35,000 of second mortgage paper, which it turned over to its creditors. A turn in the real estate market made all this paper worthless (pages 339, 340). The personal responsibility of the makers of these notes was bad; "they didn't have any commercial paper out; "* * * their individual note, unsecured, was not "negotiable" (page 340). That being so, the bank's

purchase of such notes was not a loan on personal security, but a loan on real estate, and hence prohibited by the letter and spirit of the banking act.

Nat. Bank Act, Sec. 5,136.

Nat. Bank v. *Matthews*, 98 U. S., 621, 625.

Some of the notes received by creditors were received before the suspension of the bank, and before the attempted transfer of its stock, as, for example, the claim of the People's Bank of Belleville. (page 317.)

People's Bank of Belleville v. *Manufacturers' Nat. Bk.*, 101 U. S., 181.

Other creditors accepted notes after the failure of the bank, and after the attempted transfers of its stock. Due diligence in efforts to collect and the worthlessness of the notes are shown by the dates of the judgments and unsatisfied executions put in evidence. (pages 295 320.) Moreover, Ira Homes himself had endeavored to collect these assets, and had failed to do so. (page 181.)

Appellants now assert that the last mentioned class of creditors has lost the right to prove up claims against the stockholders. Appellant's argument runs as follows: Admitting for the sake of argument that the stockholders are liable for the debts of the bank contracted before the transfer of their stock, yet they say that after the transfer these creditors accepted notes in payment of their claims against the bank, which claims were consequently extinguished. True, the bank's indorsement or guaranty purports to appear on these notes, but appellants say that, in each instance, this was either unauthorized and void, or it was a new contract, made after they had ceased to be stockholders, and therefore they deny their liability on it.

In behalf of the appellees we propose to show that this argument of the appellants is untrue in fact and untrue in law. First, as to the fact. The fact is that creditors did not accept these notes in payment of their claims, but only as collateral security. Appellants say that the notes were taken in payment because the creditors brought suit on the notes, as shown by the transcripts of judgments introduced in evidence in this cause. But a man has a right to realize on his collateral security if he can. The attempt to do so proves nothing for the defense. But when we come to examine the transcripts of judgments, we find in every instance that suit was brought not only on the note, but also on the original deposit, for each declaration contains the common counts and states an account sued on, a certain amount for money lent and advanced to the bank, a certain amount for money received by the bank for the use of plaintiff, and a balance due from the bank on account stated. (pages 295-320.) Thus the very evidence which appellants assert to be in their favor contradicts them.

The appellants called Ira Holmes as a witness (and be it remembered he is the only person who took the witness stand in their behalf in this whole case), and he does say in his direct examination that creditors took the notes in full payment of their claims, and with a thorough understanding of the condition of that bank (page 334), but in his cross-examination he retracts that statement about payment, and claims that he never made such a statement (page 364). He is furthermore discredited by the character of his whole testimony. He says that these settlements were made by personal interviews or by letters (page 363), yet he does not attempt to narrate a single conversation nor to produce one letter. He points to the

books of the bank, where the creditors are charged with the face of the notes, apparently balancing their accounts, but these charges were made by his orders, after the bank suspended, and the creditors were not cognizant of them. But as a matter of bookkeeping, these charges are perfectly consistent with the fact that the notes were collateral security; some minute must be made, when collaterals are transferred, in order to keep track of them, and the simplest way of doing it is to charge a creditor with the amount of his collateral; only, when the collateral proves worthless, it should be charged off. This charging off, however, Ira Holmes neglected to make. What would be the natural and proper evidence of the payment of the bank's creditors? What proofs would Ira Holmes take as a business man, and as occupying the fiduciary relationship of the man in charge of the bank's liquidation, if the bank's debts were really paid? Why, obviously, he would take either receipts in full or releases under seal. He shows neither receipts nor releases. He states that in some instances creditors, upon receiving notes to the amount of their account with the bank, gave their checks on the bank, balancing the account. He is at once challenged to produce any such check, but fails to do so (pages 343, 345, 346, 348, 349, 350, 352, 355, 359, 360). In short, this witness, who occupied the position of liquidator, and was accountable to both stockholders and creditors, does not produce a single voucher indicating payment.

Ira Holmes is discredited in the second place by his whole conduct in the affairs of the Manufacturers' National Bank since its failure. He was its president, and when a corporation becomes insolvent a large share of the responsibility for its failure is justly cast upon the man

who is at the head of its affairs. As he has brought the stockholders into trouble, they naturally look to him to extricate them. One of the defendants states in his answer (page 89), that Ira Holmes expressly guaranteed to protect him from stock liability. Ira Holmes admits as much in his testimony (page 364.) Now, how did he protect the stockholders? Why, first they assigned their stock to him (pages 513 518.) That was supposed to relieve them. Then he went into bankruptcy (page 77.) That relieved him (pages 493, 498.) But what became of the creditors in this merry-go-round of transfers and bankruptcy? Oh, that was their lookout. Such has been the conduct of Ira Holmes since the failure of his bank, and such conduct must discredit his testimony, when he makes a last desperate effort to shield the stockholders of the bank.

Again, he was a large stockholder himself, receiving a semi-annual dividend of over five thousand dollars in January, 1873 (page 518), and at the time he testified it was a debatable question whether his discharge in bankruptcy released his own stock liability, a question not settled in his favor until two years afterwards. (page 493.) He had, therefore, a strong pecuniary bias, on his own account, for attacking the claims of creditors.

Again, he admits that his memory is defective, because he "had about a million trades on hand at that time" (page 364.)

Ira Holmes is discredited in the next place by a great cloud of witnesses, who testify directly against him. The president of the Third National Bank of St. Louis says (page 372): "The said notes were only taken as addi- "tional security, and not in satisfaction of the debt." The

cashier of the First National Bank of Beaver Creek testifies (page 373) that the notes were turned over "as col-"lateral security for the payment of our claim, to be "applied to its payment when collected." The vice-president of the First National Bank of Watseka testifies (page 382) that the notes were taken with the agreement and understanding that they were collateral security. The attorney of the Union National Bank of Oshkosh testifies (page 389): "We insisted on releas-"ing nobody and nothing. * * *" The cashier of the National Farmers' and Planters' Bank of Baltimore testifies (page 395): "The note was taken as additional "security of our claim." See other creditors' testimony to the same effect (pages 371-412). Thus it is proved by an overwhelming preponderance of evidence—the testimony of many against the testimony of one—that these notes were taken as collateral security for and not in payment of the debts of the bank. The collaterals are worthless, and the debts unpaid. Of the foregoing creditors there are only four in number who by any construction of their testimony can be held to have taken the bills receivable in payment of their claims, but these state emphatically that they took the paper in the faith that the remedy against stockholders was not impaired thereby, and all this paper has the bank's guaranty or indorsement and has never been paid.

But suppose, for the sake of argument, that the notes had been taken in payment, the transaction would be set aside and the original claims reinstated, because the notes were taken under a concealment of material facts, whereas the status of the parties required the fullest disclosure, for Ira Holmes and the stockholders who left him in charge of the bank, occupied a fiduciary relation to the

creditors. Look at the situation of affairs: The bank had gone into voluntary liquidation by a vote of the stockholders, and Ira Holmes was left in charge to do what the law directs, apply the assets to pay the debts. While he held that position, therefore, he was a trustee for the benefit of creditors, just as much a trustee as the receiver of the bank, who succeeded him. From a trustee is required, in the language of the old law Latin *uberima fides*, the most abounding good faith. Now, the concealment of a material fact, which this trustee was guilty of, was concealing the transfers of stock. True, he makes the general statement (page 334) that the creditors in all cases thoroughly understood the condition of the bank. A sweeping remark of this kind does not carry much weight with it. Nowhere does he say outright that he told the creditors about the stock transfers. What do the creditors say on this point? The president of the Chatham National Bank says (page 378): "Nothing was said to me "about transfers of stock." An individual depositor says (page 380) the same thing. The vice-president of the First National Bank of Watseka says (page 383): "I had no "knowledge of the transfer of any stock." The cashier of the National Farmers' and Planters' Bank of Baltimore says (page 395): "Nothing was said to me "about transfers of stock. Even Chicago bankers, who had direct dealings with Ira Holmes, knew nothing about these stock transfers. The cashier of the Traders' Bank here (page 403) "did not know of "any stock being transferred." Examine the testimony generally upon this subject (pages 371–420), and it will be found that the witnesses are unanimous in saying that they accepted the notes upon the faith that the remedy against the stockholders was not impaired thereby. Again, if the

indorsements and guaranties purporting to be made by the bank upon these notes are unauthorized and void, as defendants assert, here is material failure of consideration, and a great fraud upon creditors, who took the notes upon the faith of the guaranties and indorsements, and the creditors are therefore entitled to be reinstated in their original rights.

This principle is established law even as against the United States government: "But surely it ought to require neither argument nor authority to support the "proposition that where the money or property of an "innocent person has gone into the coffers of the nation "by means of a fraud to which its agent was a party, "such money or property cannot be held by the United "States against the claim of the wronged and injured "party."

U. S. v. *State Bank*, 96 U. S., 30, 36.

Appellants say that our testimony about the notes being taken simply as collateral security instead of payment is not properly rebuttal, but that it is original evidence, and ought to have been introduced before. Appellants waived objections, however, to this informal method of taking testimony (page 309). But, indeed, an inspection of the whole evidence shows that this testimony is properly offered in rebuttal, for, first, the creditors offered evidence in the shape of deposit accounts judgments and so forth, which evidence, standing by itself, would be sufficient proof of their claims; then the appellants introduced Ira Holmes to prove that those claims were paid; then the creditors introduced the evidence in question to show that the transactions with Ira Holmes were not a payment. Can there be a better example of rebuttal evidence? It is analogous to the common law pleadings, where a declaration alleges

a certain thing, a plea confesses and avoids it, and a replication takes issue on the avoidance. Again, this testimony is admissible in its present place, because it impeaches and discredits Ira Holmes, and we could not call witnesses for that purpose until after Ira Holmes had testified. Appellants waived objections to our interrogatories being leading (page 369). The testimony on this subject being taken by deposition, it was to appellants' advantage to have our interrogatories leading so as to let appellants know beforehand the facts we wished to prove and thus enable them to shape their cross-interrogatories so as to meet the evidence expected to be brought out by the direct interrogatories.

These collateral securities are all proved worthless by unsatisfied judgments on them or by their presence in the hands of the indorsees, for in case of payment the notes would have been destroyed or surrendered to their makers. As the notes are worthless, it would do no good to surrender them to the receiver, and the law does not require the doing of a perfectly useless act; but for abundant caution the creditors do bring the notes into court and offer to surrender them (pages 424–474).

All the claims in this suit have already been established as against the bank, and consequently stockholders cannot dispute them. Most of the claims have been reduced to judgments against the bank (pages 292–320), and all of the claims are admitted by the bank from the fact that it has been defaulted (pages 157, 262). Having established these claims to be debts of the bank, we, by that very fact, make the stockholders liable, because the statute says, in express terms, that they are responsible for the debts of the bank. (Sec. 5,151, Nat. Bk. Act.)

The cases cited by appellants as proving that a claim put in judgment, or otherwise established, as against the bank is not thereby established against stockholders, are based upon statutes different from the national banking act. Under statutes similar to the national banking act, the establislishment of a claim against the bank does thereby establish it against the stockholders.

Thus, in the following New York case, a state statute enacted that for debts of a corporation unpaid at the time of its dissolution the stockholders should be individually responsible to the extent of their shares of stock, and these stockholders coming as respondents to the court of errors upon the question whether they were concluded by a judgment against the coporation, that court said:

"I perceive no escape from the conclusion that the re-
"spondents are individually liable to the same extent that
"the company itself was liable. Whatever was a debt
"against the company is now, by force of the statute, a debt
"against them, and if the company itself was concluded,
"the respondents are equally concluded."

Slee v. *Bloom*, 20 Johns., *669, *684.

The following Iowa case was a suit to enforce stock liability, and the stockholders sought to re-examine a judgment, which had been obtained against the corporation by default, but the court said:

"We do not perceive how it is to be opened to enquiry
"again."

Donworth v. *Coolbaugh*, 5 Iowa, 300, 304.

In the following Pennnsylvania case, a judgment had been obtained against a corporation for supplies furnished to it, and suit brought to enforce stock liability. The stockholders sought to attack this judgment, but the

court said: "The act of incorporation of the Pittsburgh "and Youghiogheny Coal Company makes the stock- "holders responsible for all its debts except loans, and "for this debt judgment has been obtained against the "company, and thus its rightness is conclusively estab- "lished."

Wilson v. *Stockholders*, 43 Pa. St., 424, 427.

Not a single claim rests on affidavit merely; evidence was introduced in every instance. Some affiants did claim the rate of interest stipulated in their collateral security and obtained judgments accordingly against the bank. As the stockholders put the bank in liquidation and continued Mr. Holmes, its chief executive officer, in charge of its affairs (page 520), and these affairs consisted in negotiating with creditors, it would seem that the bank's guaranties and indorsements made through Mr. Holmes would bind the bank and its shareholders. (page 495.)

Bank v. *Ins. Co.*, 104 U. S., 54.

To say that his powers of liquidation were confined simply to payment is a mistake. Manifestly large discretionary powers of negotiation and settlement are embraced in a bank liquidation. Liquidate does not mean payment merely; it has also the meanings of settling and adjudicating.

Webster's Dictionary, title liquidate.

For example, so used in an Illinois statute, which declares that interest shall run "from the day of liquidating accounts," etc., which meaning is in plain opposition to payment, for if it meant payment, interest would of course stop.

Ill. Rev. Stat., Cap. 74, Interest, Sec. 3.

Liquidate has also the meaning of clearing from complications, confusions or obscurity.

Worcester's Dict., title Liquidate.

The technical, legal meaning of the word is to ascertain the kind and precise amount of.

Bouvier's Law Dict., title Liquidate.

Yet the creditors have acquiesced in the decisions of the court, that for the purposes of this suit only their original principal should be allowed with simple interest at six per cent. (page 497.) A verification of the master's statement will show that the amount of indebtedness reported by him has been arrived at on the principle of giving the stockholders the benefit of every doubt. Thus, where a note had been dated in 1874 and drawing a large rate of interest from that date, not only has this interest been lopped off, but a reduction has been made at the same rate on the principal of the note for the year elapsing between the bank's failure and the date of the note. On the diminished principal thus obtained, simple interest is reckoned at six per cent. On any other basis of computation, the indebtedness will be found to foot up larger than the master reports.

It was unnecessary for the master to rename the individual creditors in his supplemental report; he had already done so in his main report (pages 285–288), and the supplemental report merely abated the claims, which had been reckoned on a higher computation than the original principal with simple interest (page 487). No exception was taken to his not naming individual creditors, and the amount due to each, and no exception was made claiming that he had made any arithmetical error in the computation directed by the court (page 489). The time for

taking testimony had long expired. Neither party asked to take any further evidence. The last application for an extension was made in November, 1882, when appellants asked additional time to close their proofs and received all the time they asked for, sixty days (page 189). The supplemental report, as its name indicates, is a part of the main report, and the two together show the creditors and the amount due to them. Appellants make a point upon the fact that some notes are dated subsequent to the suspension of the bank, but their own witness states that these notes were undoubtedly renewed notes (page 362). Appellants assert that in a few cases paper with the bank's guaranty or indorsement has been introduced in evidence, where no account appears on the books of the bank in the name of the present claimant; this is true, but it is not claimed in the evidence that the bank negotiated any notes after its failure except in settlement or alleged settlement of pre-existing indebtedness (page 362). It would be competent for a creditor to assign his claim, and the assignee would stand in the shoes of the assignor. If the bank's guaranty or indorsement were made before the bank went into voluntary liquidation, the claim could, of course, be proved up against the bank; if made afterwards it could still be proved up, if valid; and, if invalid, there would be, as we have heretofore shown, a material failure of consideration, entitling the creditor or his assignee to sue upon the original claim.

U. S. v. *State Bank*, 96 U. S., 30, 36.

This was done in every case, any excess of interest over six per cent. being abated. The Walker paper specifically referred to in appellant's brief is dated August 8, 1873, which is prior to the suspension of the bank (page 222.)

As to appellant's assertion that certain claims of the Third National Bank, of St. Louis, were twice reduced to judgment and twice allowed in the case at bar (printed case, pages 295, 296, 312, 313), these claims were first proved up in 1879 (pages 198, 203), yet no objection or exception of this kind were made at any time in the court below, where there would have been every opportunity to examine into the matter. In a laudable effort not to encumber the record, only such parts of the books of the Manufacturer's National Bank were brought before this court as were necessary to settle the issues raised in the court below (pages 291, 513). It is obvious that the whole books of this great bank, introduced in evidence in the Circuit court (pages 293 295) would have made a most gigantic record here. Happily, however, the record in its present state indicates that appellants are mistaken about any double allowance. The cash item mentioned by Mr. Lionberger (page 371), must have been paid before the failure of the bank, or paid on another account, because the books of the debtor bank show a credit of $11,273.74, which has continued to the present day (page 296). No cash payment of the amount mentioned by Mr. Lionberger is charged against the account. It may also be remarked in passing, that no notes are charged against the account, which confirms Mr. Lionberger's statement that he took the notes as collateral, and not as payment. After the account had been proved up in the manner now criticized by our opponents, they examined Ira Holmes, the president of the Manufacturers' National Bank, and he does not attempt to dispute the account (pages 342, 343). The judgments entered prove the correctness of the account. Because the judg-

ments were rendered on notes of same date and amount, this does not prove that there was only one note. In another claim proved up we find five notes of five thousand dollars each, all dated the same day, payable at the same time, and drawing the same rate of interest, (page 317), yet no claim is made that there is only one note of five thousand dollars. In the matter now under investigation Mr. Lionberger was called to testify whether his bank received paper from the debtor bank as collateral security or payment (page 371). No inquiry was made as to the amount of the paper, but he evidently made a hasty attempt (page 372) to examine the books of his bank, and testify as to the amount, and in so doing make a mistake which has caused confusion until corrected by an examination of the account on the books of the debtor bank. The notes themselves were already in evidence in Chicago, so that the witness testifying in St. Louis did not have them to refer to. But the notes themselves show the correctness of the Third National Bank claims as proved up. It is stipulated (page 291) that the abstract of evidence introduced and accepted in lieu of the original evidence "contains literal copies of the notes therein mentioned," with leave to either party to correct any error or inadvertence by introducing new evidence or by the evidence on file. No new evidence was introduced as to the contents of the notes, and there is no contradictory evidence on file. Now there are differences on the faces of the two Philpot notes, which negative appellants' theory of their being one and the same note. The Philpot note first introduced in evidence has the date of its maturity written out in full—"February 1st, 1874" (page 296), and the rate of interest is written out—"ten per cent." (*idem*) and it has also

the words "until paid" (*idem*): whereas the Philpot note next introduced in evidence has the date of maturity abbreviated—"Feb'y 1st, 1874"; the rate of interest expressed in figures—"10 per cent.," and the words "until paid" omitted (page 313). Thus the faces of these notes are different. Their backs are different also, for there is a full guaranty by the bank on the back of the first Philpot note: "The Manufacturers' National Bank of Chicago, for value received, guarantees payment of within note at maturity. Ira Holmes, Pt" (page 296), while the only writing of the bank on the back of the second Philpot note is the simple endorsement: "Ira Holmes, Pt." (page 313). That was his official signature as president of the bank (page 218). The evidence is equally plain that the Third National Bank held at least two Smith notes, if not three. Claim is only made upon two, however. One Smith note and the suit upon it were introduced in evidence (page 296) and two similar Smith notes and the suit upon them were introduced in evidence (page 313); judgments were only recovered upon two of the Smith notes, however (pages 296, 313). The Smith note first introduced in evidence bears the full guaranty of the bank (page 296), while the others bear a simple indorsement (page 313). That there was a whole batch of Smith notes of the same date and denomination is shown from the fact that other creditors, Smart & Gudgell, also received one (page 297). While the evidence thus shows the correctness of the Third National Bank claims as proved up, yet should there remain any suspicion of a double allowance, the court below will investigate it without a reversal of this decree, for it would, of course, be a fraud if the same claim were allowed twice. If such proved to be the fact, it would diminish to that extent the

aggregate of indebtedness, and any surplus thus caused, or indeed a surplus of any kind, would go back to the stockholders, they having the next claim on the bank after payment of just debts.

It is intimated by appellants that the bank and its stockholders cannot be joined as defendants. But appellants cannot complain of this. They identified themselves with the bank, when they put it in voluntary liquidation and invited creditors to present their claims.

Nat. Bank Act, Secs. 5,220, 5,221.

When this invitation was found to be delusive, all the authors of it, stockholders as well as bank, had to be brought into a court of equity to account for their broken promises. It is, moreover, the established practice in bills in the nature of creditors' bills, that the original debtor should be a party as well as any other persons, out of whom the creditor hopes to make his claim. If the original debtor pays, that lets off the others. It is for the benefit of stockholders that the tangible assets of the bank should be exhausted before resorting to stock liability. The bank is now a mere nominal party.

As to appellants' claim, that only judgment creditors could come in under the bill in this suit, that would not be so, even if this were a creditor's bill, pure and simple. A creditor's bill, pure and simple, must be begun by a judgment creditor, because the remedy at law is required to be exhausted by the judgment and the unsatisfied execution, before equity will relieve, but that fact is proved by the very first judgment and unsatisfied execution thereon, and a multiplication of proofs would be entirely unnecessary, hence other creditors come in without any preliminary proceeding, which the first creditor has

proved to be useless. Again the proceeding in the case at bar is under the statute which expressly says that it may be brought for the benefit of all creditors, making no distinction in the class or character of their claims.

Appellants are mistaken in their averment that the First National Bank of Hastings recovered a $20,000 judgment on a $5,000 note. The amount it had on deposit at the time of the debtor bank's failure was $13,441.48. (page 309.) Subsequently the Hastings bank sued not only on the $5,000 note, but also on the open account, and recovered a judgment of $13,441.48 (page 309), which, with interest, makes up the $20,000, which was, however, abated by the general scaling down order, which we have already considered. Appellants' witness had no recollection of this account outside of the one note, for, although he claims that a settlement was made, he cannot say whether the creditor bank received paper or cash or what (page 354). The judgment shows that no settlement had been made, and it shows the amount due at the time the judgment was rendered.

III.

INTEREST RUNS ON DEBTS OF THE BANK.

We now discuss the point that the debts of the bank draw interest. The Illinois statute, cited by appellants, allows interest on a balance struck and for unreasonable and vexatious delay of payment.

(Ill. Rev. Stat. Cap. 74 Interest, Sec. 2.)

The books of a bank are balanced every day, so that a teller can tell at a glance whether the check of any indi-

vidual depositor overdraws his account or not. In the case at bar creditors have been trying for over ten years to get their money, and the record shows that every technicality has been interposed to defeat them.

In bankruptcy proceedings it is usual to stop interest at the date of adjudication, but this seems to be on the principle that a bankrupt estate is a fixed quantity and rarely, if ever, pays the principal of the claims. It therefore makes no difference in the dividend paid, whether interest stops at one period or another, provided this period is the same for all claims, and the most convenient period is the date of adjudication.

In re Haake, 7 Nat. Bkrptcy Reg., 61.

Where, however, the bankrupt estate is sufficient to pay interest also, then interest is allowed. Thus in the following case, the court say: "The counsel for the opposing creditors contends that the debts should be proven "as of the date of the adjudication. I am inclined to "adopt that as the proper construction of the 19th section of the bankrupt act. But the claims will draw "interest, of course, since then and up to the payment, at "the agreed rates when that is agreed upon, and when "not, at the legal rate."

In re Strachan, 4 Legal News, 145, 146.
Brown v. *Lamb*, 6 Metcalf, 203.
Atlas Bank v. *Nahant Bank*, 3 Metcalf, 581.

In the case of national banks, however, the assessment on stockholders varies according to the amount of the debts, and it hence becomes very important, where the face of the claims, as in the case at bar, would not ex-

haust the stock liability to add interest to those claims. It has therefore been decided that: "The interest accru- "ing upon each of these claims was as much a part of it "as the original debt."

Nat. Bank v. *Mechanics' Nat. Bank*, 94 U. S., 437, 439.

In the above case the creditor claimed interest from the date of his demand down to the time of payment, and it was allowed him. Indeed, in cases of insolvency interest is allowed from the time of public insolvency, without the necessity of demanding it. "A demand under such cir- "cumstances would have been an idle ceremony. * * * "interest is to be computed from the first publication of "the proceedings in insolvency. Reason and analogy "favor the application of the rule to the present case."

Chemical Nat. Bank v. *Bailey*, 12 Blatchf., 480.

The following case, cited by appellants, simply decides that interest on all claims must be computed to the same time, and that it would be unjust to allow one claim only to bear interest subsequently:

White v. *Knox*, 111 U. S., 784.

In the case at bar interest *is* computed on all claims to the same time.

IV.

THE STATUTE OF LIMITATIONS IS NOT A BAR, AND HEREIN OF VOLUNTARY LIQUIDATION BEING A WAIVER OF THE STATUTE.

We now argue our next point, that the debts are not barred by the statute of limitation. In the first place, all the creditors, with the exception of twenty-two small depositors, have been made co-complainants or otherwise become parties to this litigation, upon intervening petitions and orders thereon, without objection from the defendants. Some of these orders are absolute in their terms, and some require objections to be filed in ten days or they become absolute, and no objections were filed (pages 16, 58, 98, 131, 161, 162, 163, 168, 171, 178, 179, 186.) It is stated, without warrant, in appellant's brief, that these orders were entered without notice. It is presumed that the parties in a cause are cognizant of the proceedings therein and, therefore, it is not customary to swell a record with every notice given to the opposite party. For orders entered without notice, an adequate relief is by motion to vacate. No objections appear to making these creditors parties to the suit, until years after they were joined, the statute of limitations being pleaded for the first time in 1883 (pages 241, *et seq.*). The appellants had acquiesced in such joinder. The claims of the twenty-two small depositors aggregate, principal and interest to date, less than $3,500, and, if rejected, would not appreciably diminish the assessment. The receiver included them in his list, believing that it was his duty as the representative of all creditors to do so. It is a mis-

take to say that these claims were first brought forward January 31, 1884, over ten years after the bank went into liquidation; on the contrary the books of the bank, showing this indebtedness (pages 320 322, 519) were first introduced in evidence June 24, 1879 (pages 192, 193, 194, 197, 201). These claims are entirely unpaid, as appears from the books of the bank (pages 320 322, 519). If this assessment were levied by the comptroller of the currency, he would look at the books of the bank and include these claims as a matter of course. The accidental circumstance that an assessment has in this case been levied by the court does not change the principle upon which it should be made. The act authorizing the present suit,

Sec. 2, Nat. Bk. Act of 1876,

expressly authorizes one creditor to sue for himself and all others; so under the law it is entirely unnecessary for these small creditors to file intervening petitions. In the following case a creditor did not file any intervening petition, but his claim was proved up before the master in chancery, and the Supreme court of Illinois held this to be sufficient.

Derrick v. *Lamar Ins. Co.*, 74 Ill., 404
Pennell v. *Lamar Ins. Co.*, 73 Ill., 303

Intervening petitions of some other creditors were dismissed at one time (page 15), but subsequently reinstated (page 161).

The next answer to the defense of the statute of limitations is that appellants' pleading broadly asserts that *all* the claims are barred by the five years' statute (page 241 *et seq.*), whereas, even upon appellants' own construction of the statute and the pleadings, the claims of

Irons, Shugart, Scott and Wrigley and First National Bank of Hastings were brought into the case within the five years' period (pages 1, 13, 16, 58.) The pleaders, upon their own showing, therefore, have alleged too much, and upon their own showing, the proof fails to support the pleading. The pleading must, therefore, fall.

"If one entire plea be bad in part, it will be insufficient "for the whole. * * * In assumpsit, on several "promises in different counts, if the defendant plead the "statute of limitations to the whole, and it is a bad plea "as to one of the counts, it will also be insufficient as to "the residue."

1 Chitty's Pleadings, *546.

In the case at bar each claim is a separate matter, like each count in a declaration.

In the following case it was held that the statute of limitations therein pleaded, "being ill in part, is ill in the "whole."

Webb v. *Martin*, 1 Levinz, *48.

In the following case, a declaration contained several distinct causes of action, and the statute of limitations be-pleaded in bar of the whole suit was held bad entirely, because one cause of action was not within the statute.

Perkins v. *Burbank*, 2 Mass., 81.

As to the statute of limitations, "it must be set up and "relied upon by pleading. This is true both at law and "in equity."

Borders v. *Murphy*, 78 Ill., 81, 87.

As to the claim that no replications were filed to the amended answers, no special replication is now required under any circumstances.

Desty's Fed. Procedure, p. 290, equity rule 45.

Any general replication would, therefore, stand, and such replications are on file (page 155), and are recognized by the interlocutory decree (page 261), and the final decree (page 496), as applying to the amended answers. No objection was made in the court below to the lack of a new replication.

The following case holds that objection to the want of a replication cannot be taken for the first time in the Supreme court.

Clements v. *Moore*, 6 Wall., 299.

The same case also holds that a statement on file that the plaintiffs join issue with the defendants is a sufficient replication.

Ibid.

Much more so is the finding of the court in the case at bar, that the cause was at issue (pages 261, 496). Where decree recognizes a replication to have been filed, it will be so considered, even if no replication appears in the transcript of record.

Hurd v. *Ascherman*, 117 Ill., 501, advance sheets.

The next answer to the defense of the statute of limitations is that the stockholders in the case at bar made fraudulent transfers of their stock, as we shall see under the next head of our argument, where stock transfers are discussed, and these transfers had to be set aside before the statute began to run.

In the following case stockholders made an agreement

in fraud of creditors that there should be no further liability on their stock. When creditors sued the stockholders on the stock, the latter pleaded the statute of limitations, but the court say that "the proceeding for an "assessment was in effect a proceeding to accomplish "two purposes: first, to set aside the contract between "the company and the stockholder; and, second, to fix "the amount which he should be required to pay. Until "these things were done, the cause of action against the "stockholder did not accrue. * * *"

Scovil v. *Thayer*, 105 U. S., 143, 156.

So in the case at bar, the proceeding for an assessment sought first to set aside the fraudulent transfers of stock (page 30), and this was not accomplished until the interlocutory decree of June 1, 1883 (page 261.) At that time all the intervening petitions had been filed and orders entered thereon, and the bill had received its final amendment (page 241.)

Indeed, it would appear that the statute of limitations would not begin to run in favor of stockholders until a decree is entered ordering an assessment upon them.

Glenn v. *Semple*, Sup. Ct. Alabama, Dec. term, 1885.

A liability of any kind certainly cannot be barred until it comes due. It would seem that stock liability does not become due until an assessment is ordered, for then only is the amount ascertained and drawing interest. Where the comptroller of the currency imposes the assessment, stock liability bears interest from the date of his letter ordering the assessment.

Bowden v. *Johnson*, 107 U. S., 251, 263.
Casey v. *Nalli*, 94 U. S., 677.

By analogy in a case in court, the liability would bear interest and become due from the date of the decree of court fixing the assessment. That decree was entered June 1, 1886 (page 496.)

It would at least seem to require some investigation into the assets of the bank, before the statute of limitations begins to run in favor of stockholders, for they cannot be sued unless such suit is necessary for prompt payment of the debts of the bank.

Sec. 5,234 Nat. Bk. Act.

Indeed, appellants set up as a defence that the receiver has not fully collected or exhausted the assets of the bank (pages 110, 115, 120, 125, 130, 142, 376), and the date of the master's report ascertaining that there are no assets outside of stock liability is January 2, 1885 (page 286.)

Our next point on the statute of limitations is that voluntary liquidation is a waiver of the statute of limitations. Involuntary liquidation is in itself notice to a creditor to look out for his own interests, and be diligent, for it shows him that the stockholders and officers of the bank have abandoned its management or been forced to resign it; but in the case of voluntary liquidation, the stockholders and officers hold out to the world that they will continue to manage the affairs of the bank for the benefit of its creditors. By their own action, they pledge themselves to faithfully administer all available funds for the payment of debts. A creditor has every reason to believe, therefore, that all resources, including stock liability, will be drawn upon, if necessary, for the purposes of liquidation. He knows that liquidation is a matter of time, and hence waits patiently for results. How much his confidence

will be abused, if the very extension of time, which he gives to stockholders, and really at their own request, to pay him, is made by them a bar to payment. In the present case, creditors were lulled into a false sense of security by the resolution of the stockholders of the bank that it is "for the best interest of the stockholders and "depositors alike that its affairs be placed in voluntary "liquidation" (page 520), and by the cheering assurances of the officers that "the affairs of the bank can "be liquidated more successfully and expeditiously "through their own efforts than through any other "course, and they will make all possible and justifiable "efforts to that end" (page 521.) The stockholders and officers of the bank occupied a fiduciary position towards creditors.

Until a trustee repudiates a trust, and this repudiation is brought to the knowledge of the beneficiary, the statute of limitations does not begin to run.

Phillippi v. *Phillippe*, 115 U. S., 151.
Oliver v. *Piatt*, 3 Howard, 333.

"The fact that the statute" [of limitations] "is positive "in its terms will not under all circumstances operate as "a bar in equity. There are cases in which a court of "equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the "right for the prevention of a fraud."

Henry County v. *Winnebago Drain Company*, 52 Ill., 300, 301.

Indeed, the law-makers shared in this natural confidence that stockholders putting a bank in voluntary liquidation

would do so in good faith, and that stockholders would consequently, of their own motion, assess themselves on their stock liability, if necessary, to pay debts, for the statute at first provided no compulsory process for reaching stock liability in cases of voluntary liquidation. The statute declared that the liability existed, however, in every case (Nat. Bk. Act, Sec. 5,151), and with an enlarged knowledge of human nature, Congress afterwards provided a statutory remedy.

Sup. to U. S. Rev. Stat., Cap. 156, Sec. 2, Vol. 1, p. 217.

"It is * * * but just that when the interest of the "public or of strangers dealing with this corporation is "to be affected by any transaction between the stock- "holders who own the corporation and the corporation "itself, such transaction shall be subject to a rigid scru- "tiny, and if found to be infected with anything unfair "towards such third person, calculated to injure him or "designed intentionally and inequitably to screen the "stockholder from loss at the expense of the general "creditor, it should be disregarded or annulled as far as "it may inequitably affect him."

Sawyer v. *Hoag*, 17 Wall., 623.

Appellants, in pleading the statute of limitations, ignore the fact that voluntary liquidation is the act of the stockholders. The stockholders put the bank in that condition and they appoint the agent to manage its affairs. In the case at bar they continued the bank president in charge. In the case of involuntary liquidation the control is wrested from the stockholders; but in the case of voluntary liquidation, stockholders, by their own action, are bound

up with the bank. That being so, a claim would not be barred as against stockholders until it was also barred as against the bank. Now we have seen that the claims against the bank are based upon deposits. A deposit in a bank is an evidence of an indebtedness in writing, for the bank books show it; the entry to the depositor's credit is a written admission of the debtor bank, and hence is not barred until ten years, under the Illinois statute.

"Actions on * * evidences of indebtedness in writing "shall be commenced within ten years after the cause of "action accrued."

Ill. Rev. Stat. Cap., Limitations, Sec. 16.

Before the ten years had expired in the case at bar, the creditors' bill had received its final amendments, the intervening petitions had been filed, the bank defaulted and the interlocutory decree entered (page 261).

Appellants' cases on a shorter statute of limitations running in favor of stockholders, lack the element of voluntary liquidation; for example their citation of

Godfrey v. *Terry*, 97 U. S., 171.

Voluntary liquidation is, indeed, a quasi-judicial proceeding authorized by the statute, wherein stockholders invite creditors to present their claims for payment, instead of resorting to ordinary tribunals for the collection of debts.

Secs. 5,221, 5,222.

Creditors, in presenting their claims there, as the evidence shows they did soon after the failure, did in effect commence a friendly suit then. They had a right to rely

upon the good faith of the proceedings, and to believe that all resources, including stock liability, if necessary, would be applied by this board of liquidation.

A final and conclusive answer to the plea of the statute of limitations is that within three years and one month after the failure of the bank, the original Irons suit was by amendment brought in behalf of all creditors against all stockholders; it recites the suspension of the bank and prays "that an account be taken of the amounts due from "each of the said defendants to your orator and the judg- "ment and other creditors of said bank as stockholders "thereof, upon the basis of the number of shares of stock "held by them at the time the said bank suspended pay- "ment in the manner as aforesaid, in pursuance of the "provisions of the act under which the said bank was "organized and by which the liability of the stockholders "is therefore fixed and determined" (page 25, 34), "and for such other and further relief in the premises "as to your honors shall seem meet and equity re- "quire" (page 35). Thus the statutory liability was invoked in express terms.

Being thus filed under the statute, which directed that it could only operate in behalf of complainant and all other creditors, the law gave direction and force to all that could be done under it. We submit that the act of 1876, authorizing the filing of this bill, is not to be considered as a rule of practice or a rule for the framing of the bill, but as a rule defining the rights of the parties under such a bill, and that whether such a bill professed upon its face to be filed in behalf of complainant and all other creditors, the court would give it such direction and force and no other; and that hence from the time this amended and supplemental bill was filed in October, 1876,

it has been a proper bill under which to enforce the individual liability of stockholders.

The one inconsistent prayer in this bill, viz: that Irons might be first paid, being repugnant to the general body of the bill and the statute, the court, of course, could not grant; this repugnant prayer was therefore surplusage, or, at most, obnoxious to special demurrer, and if stricken out would still leave enough to enforce the statutory liability of stockholders. Out of abundant caution the complainants did strike it out (page 241), so as to indicate more plainly that the bill was filed on behalf of all creditors. It was a disingenuous defense for the defendants to then plead the statute of limitations, for they had previously fully recognized and strenuously asserted that the bill of October 5, 1876, was brought to enforce the statutory liability. The occasion of this recognition and assertion on their part was on account of the receiver's attempt in the year 1882 to enforce stock liability by suit, as at common law. Each defendant pleaded (and their present solicitors signed the pleas) that the suit at law should be abated because the Irons bill of October 5, 1876, was filed in behalf of all creditors to enforce the statutory liability of the stockholders, and the court sustained the plea, saying: "It seems to me there is no room to doubt that " this stockholder's liability can be completely enforced in " the Irons case."

Harvey v. *Lord*, 10 Fed. Rep., 236.

The case at bar being brought within the shortest statute of limitations, and in behalf of all creditors, inured to the benefit of them all and stopped the operation of the statute of limitations.

V.

STOCK TRANSFERS WERE INVALID.

Our next point is that appellant Comstock's stock transfers were invalid. Many stockholders transferred their stock to Ira Holmes on the books of the bank about the time of the bank's failure, but the Circuit court held these transfers void as against creditors (pages 261, 497). Appellant Comstock is the only stockholder of this class before this court.

It is alleged in the bill that the bank suspended payment on or about September 22, 1873 (page 26.) Mr. Comstock's answer admits this allegation (page 144). The bill makes the further averment that *after* the suspension of payment, as aforesaid, the bank went into voluntary liquidation (page 26). The answer raises no issue on this point, but admits that the bank went into voluntary liquidation (page 144). It is undisputed that the date of going into voluntary liquidation was September 26, 1873, the resolution to that effect having been passed the previous day (page 520). Appellant's stock transfers appear on the books of the bank September 23 and 24, 1873. Appellees' witness, Harvey, testifying in 1879, places the date of the bank's suspension as September 23, 1873, deriving his knowledge from one of the officers of the comptroller, who was there and made his headquarters with the witness (pages 291, 292). This evidence is good; insolvency is proved by reputation. Appellants' witness, Holmes, testifying in 1884, says that the bank did not suspend until September 26, 1873, the day it went into voluntary liquidation (pages 334, 342).

In any case, therefore, these transfers were made on the books of the bank, either after the failure or on the very brink of the failure. Let us consider the state of facts at that time. We quote from the testimony of Ira Holmes, appellant's own witness, that the drain on the bank's cash resources began between the 1st and 10th of September, 1873, and a financial panic occurred within five days from the latter date (page 361.) As soon as the panic commenced, the directors were in consultation, and so continued for a week or ten days (page 365.) Appellant Comstock was a director (page 145.) The bank kept running as long as it had any money (page 334); but was soon obliged to stop, and on September 26, 1873, went into voluntary liquidation, having had an extraordinary drain on its money (page 520.) Comstock, being a director (page 145) and hence in a position to see the crash coming sooner than the others, was the first to transfer his shares on the books of the bank, doing so two or three days before the failure was publicly announced (pages 517, 520.) From that date on not a single purchaser of the stock was found except Ira Holmes (pages 513 517), who was the president of the bank. His fortunes were so closely bound up with the bank that when the bank failed his failure quickly followed (page 317); hence his assumption of the stock could give no additional security to the creditors of the bank, but if allowed to stand would deprive them of their recourse against solvent stockholders. Nevertheless he was loaded up with the sins of the stockholders, and, like a Jewish scapegoat, sent off into the wilderness of bankruptcy (page 77.) The worthlessness of the bank stock may be seen from the considerations paid by Holmes to the various sellers. The Ray and Whitney

transfer is as follows (page 220): They owed a note to the bank and paid it off with their stock, which had ceased to be an asset and had turned into a liability, yet with this liability they extinguished another liability — clever financiering, to which the nearest parallel is that of men who are said to live on the interest of their debts.

Sawyer v. *Hoag*, 17 Wall., 610.

The actual considerations paid in some of the other cases are as follows: A carriage (page 96); land subject to first and second mortgages (page 89); bonds worth twenty-five cents on the dollar (page 113); one second-hand buggy (page 107); one second-hand sleigh (page 107); worthless land (page 103). In some instances the sellers took an express guaranty from Holmes against stock liability (pages 89, 364), proving that one of the objects in selling was to avoid stock liability. Mr. Comstock does not mention any price received by him for a hundred shares of his stock (page 144), and he cannot state what price he did get for his remaining fifty shares. All he knows about that is that he lumped his fifty shares with some other property and received for the whole a substantially worthless piece of land (page 145.)

"No transfer of stock can be completed unless shown "on the books of the bank."

First Nat. Bank v. *Smith*, 65 Ill., 44.
Wheelock v. *Kost*, 77 Ill., 296.
Brown v. *Adams*, 5 Biss., 181.
Hale v. *Walker*, 31 Iowa, 344.

"Now it was the duty of defendants to see that those "shares were transferred * * * on the said books."

Bowden v. *Farmers' Bank*, 1 Hughes (U. S. Cir.), 307.

Adderly v. *Storm*, 6 Hill, 624.
Thompson's Liabilities of Stockholders, Sec. 217.

Transfers of stock made in contemplation of the bank's insolvency are void.

National Bank v. *Case*, 99 U. S., 628.
Nathan v. *Whitlock*, 9 Paige, 152.
Bowden v. *Santos*, 1 Hughes, 158.
Bowden v. *Johnson*, 1107 U. S., 251.
Thompson's Liability of Stockholders, Secs. 211, 215.
Johnson v. *Laflin* (by Dillon, J.), 6 Cent. Law Jour., 161.

Insolvency means failure to pay debts as they fall due in the usual course of trade or business.

2 Kent's Com., 389.
Wager v. *Hall*, 16 Wall, 599.

The inquiry, therefore, is as to the seller's good faith at the time the transfer is effectuated on the books of the bank. In Comstock's case we have grouped together the circumstances which show that at the time his transfers were made on the books of the bank, the bank had suspended, or that he knew it was about to suspend.

Bowden v. *Johnson*, 107 U. S., 251.

As to fifty shares of his stock, it is admitted by him that the sale as well as the formal transfer were made on or about the 23d of September, 1873 (page 145), but as to a hundred shares he tries to shield himself from liability on the alleged ground that he sold, assigned and de-

livered fifty shares to Ira Holmes about February 8, 1873, and fifty shares to one Maynard about June, 1873, "that "he endeavored repeatedly to have said stock transferred "on the books of the bank, but that said Maynard re- "fused to allow said stock to be so transferred, although "he had before promised to have the same transferred." (page 144.)

No explanation of these transactions is afforded by Mr. Comstock. He simply makes the statement in his sworn answer, as we have quoted it. He does not take the witness stand and submit to cross-examination. What the negotiations were for the purchase of his stock, what price he received, what efforts he made to have the stock regularly transferred, what difficulties were in the way, why Maynard refused to allow the transfer, why Comstock, knowing the stock was not transferred, did not apply to the bank or to Holmes, or to the courts to have it done, all of these things are mysteries.

It will be observed that the answer stoutly asserts the good faith of the sale admitted to have been made when the bank was about to fail, as well as the good faith of the sales alleged to have been made at an earlier date. The first assertion is so palpably untrue that it discredits the whole answer. No assignments were produced, as they would naturally be if their dates corroborated Comstock's claim as to the time the sales took place. Maynard is not called as a witness, nor does his name anywhere appear on the bank books as a stockholder. (pages 513, 517.) It is not claimed that any power of attorney to transfer the stock was executed by Comstock to the purchaser. Yet this would be necessary to allow the purchaser to take legal title in himself by the issue of a new certificate;

whereas, a simple assignment would merely transfer an equitable interest. Ira Holmes is asked about the Comstock stock transfers. (pages 341, 342.) His testimony is objected to because the stock transfers had already been investigated and set aside by the court (page 261) and the reference then pending before the master was simply to ascertain the indebtedness of the bank. (*Ibid.*) His testimony was plainly incompetent therefore. However he does not clear up any of the mysteries of the Comstock sales. He glibly states that none of the transfers of the Comstock stock to him (Holmes) were made in anticipation of failure or with any idea there was any trouble with the bank. (page 342.) Be it remembered, that one of the sales of Comstock stock to Holmes admittedly took place two or three days before the bank went into liquidation.

Ira Holmes, in the answer of himself and the bank to the original bill, does not claim that the actual sale of any of the Comstock stock, antedated its transfer on the books of the bank; all he does state is that the stock of Charles Comstock and other persons, was transferred on the books of the bank September 24, 1873 (page 22); he and the bank admit in effect that all sales of stock to him were really sales to the bank, for the answer claims that the original stock of half a million had been reduced by settlements to one hundred and seventy-eight thousand dollars (page 23). As if a court of equity would for a moment permit a ruined bank and its stockholders to make such an arrangement for the extinction of stock liability. Under the foregoing state of facts, as to Comstock's transfers, his counsel vainly try to shelter him under the wings of *Whitney* v. *Butler*, decided at the present term of this court. In that case there was noth-

ing to make the sellers suspect that the transfer had not been properly made on the books of the bank; they had sold their stock at public auction through a broker, at a premium; they had executed the usual power of attorney as well as assignment, and had caused the same to be delivered to the bank with their certificate of stock, and had communicated to the bank the name of the buyer. They had, therefore, done all that prudent business men reasonably would do under the circumstances, and their delivery of these documents to the proper custody was considered a proper transfer, by analogy to the case of a grantor in a deed, who is protected if he files his deed for record, notwithstanding the recorder may neglect to record it. There was no question of good faith in the case of *Whitney* v. *Butler*, and the facts therein were stipulated.

VI.

THE STOCK LIABILITY IN A NATIONAL BANK SURVIVES AGAINST THE ESTATE OF A DECEASED SHAREHOLDER.

The facts as to the Adams' estate (the only estate before this court), are that the intestate owned two hundred and forty shares of stock at the time of the bank's failure, and continued to own them all his life. The court, in setting aside (page 203) a nominal transfer of this stock which appeared on the book of the bank after the failure (page 513), acted upon the solemn admission in the sworn answer of Mr. Adams, "that he is still the holder and "owner of said stock" (page 122). During the lifetime of Adams, the intestate, the bank failed, its debts were unpaid, the cause of action accrued against the stockholders, suit was brought to enforce their stock lia-

bility; Adams was one of the defendants; service obtained on him, his answer filed and much testimony taken in the case, the date of his death being June 6, 1882. (page 271). The demurrer of his administrator (page 274), admits the allegation in the bill of revivor, including the averment that the estate is solvent (page 272). The question is, whether under such circumstances stock liability survives.

The statement of counsel for the Adams estate that contracts of a personal nature do not survive, may be more precisely expressed as follows: The obligation of an executory contract, where the element of personal skill exists, does not extend to the administrator or executor. Thus, in a contract to write a book, a bargain is made for the genius and knowledge of the writer, which, of course, does not extend to his executor.

Marshal v. *Broadhurst*, 1 Tyrwh., 349.

An analysis of appellant's own cases proves this principle, and we take them up *seriatim*. Thus, the erection of a lighthouse requires a technical skill in the builder. The authority, however, which is cited by our opponent as a lighthouse case, was really a contract to play the piano (!), which is a still better illustration of the doctrine.

Robinson v. *Davison*, L. R. 6, Exch. 269, 274.

His next case is a contract to instruct apprentices, depending on the same element of personal skill in the master.

Baxter v. *Burfield*, Botts' Poor Laws, 696, 6th ed.

In appellant's next case, where a woman was carrying on the same business as her deceased husband, in alleged violation of his agreement, the decision of the court is grounded on the express language of the contract, and also on the fact that the widow carried on the business for her own benefit and not as administratrix. Of course, a man cannot, by a will or otherwise, prohibit another from exercising any lawful occupation. The opinion is: "GOULD J. grounded himself upon the distinction in the "two clauses, viz.: that Cooke himself (without naming "his executors, etc.), should abstain from the business of "a newsman, but that the payment was to be made to "him, his executors, administrators and assigns; that this "was now payable to the plaintiff, not as wife but as "administratrix of Cooke, and was assets for the pay-"ment of his debts. It would, therefore, be very hard "to debar her from exercising a lawful occupation for "her own livelihood in consequence of this personal cov-"enant of her husband."

Croke v. *Coleraft*, 2 W. B., 856.

In modern times indeed, it is doubtful whether an agreement not to transact a certain business anywhere could be enforced, even against the person contracting, it being a contract in restraint of trade and prohibited by public policy.

In appellant's next citation, the court held that the contract did not mean by its language to make the executors carry on the business, and hence they were not bound to do so, but that they were responsible for all liabilities of their testator which had arisen under the contract during his life-time. The court say: "The law trusts people to "settle up estates on account of their honesty and gen-

"eral business capacity, and not for any peculiar scientific "skill, and the state does not hold itself bound to furnish "such abilities. Some people may suppose that it requires "no great skill to manufacture boards, if one has the ma- "terial and machinery; but still we cannot suppose that "the deceased was contracting for any kind of skill in "his administrators. For these reasons the court below "was right in declaring, in substance, that the adminis- "trators were liable only for breaches committed by the "intestate in his life-time. * * *"

Dickinson v. *Callahan*, 19 Pa. St., 227.

Williams v. *Burrell*, 1 C. B., 402, cited by appellant, was a case where executors were held liable on their testator's covenant.

The Massachusetts decisions, cited by appellant, simply construed local statutes, and made no attempt to lay down a general principle.

Thus, *Dane* v. *Dane Mfg. Co.*, 14 Gray, 488, is a case under the Massachusetts manufacturing incorporation act, and holds that a stockholder's liability under this statute cannot be enforced against his executor. The court limits its decision expressly on the peculiar phraseology of the statute, saying: "It is to be borne in mind that "this individual liability of stockholders for the debts of "a corporation is one depending solely upon the provisions "of positive law. It is to be construed strictly," etc. The court admit that the Massachusetts law is a clumsy piece of legislation: "The present state of the law is "sufficiently embarrassing * * * in the ordinary "case of living stockholders." In this Dane case, suit was brought upon the Massachusetts statute.

Mass. Public Acts, 1851 1852, Cap. 315, p. 811, and under this statute, the only way to reach a stockholder for an unsatisfied corporation debt, was to first exhaust the property of the officers of the corporation, then summon the stockholder and levy an execution on his property. As no writ of execution can run against the estate of a deceased person, but his estate must be distributed by his administrator in due course of administration, the statute failed to cover the case of a deceased stockholder. The case at bar, however, is a suit in chancery, with all the flexible remedies of a court of chancery for its enforcement, and a decree against the administrator would only direct him to pay the claim in due course of administration.

Bacon v. *Pomeroy et al.*, 104 Mass., 577, cited by appellant, is a case partly depending on the Massachusetts statute.

Secs. 17 and 34, Cap. 60, and Sec. 5, Cap. 61, Mass. Gen. Stat., A. D. 1860, pp. 338, 342 (being substantially the same statutes as the one involved in the Dane Manufacturing Company case, upon which we have already commented), and partly upon a written agreement of the corporators to be liable as partners. As regards the stock liability, the court follows the Dane Manufacturing Company case for the same reasons which that case is founded on; so for answer we refer to our comments in that case. As to the partnership liability the court holds that the estate of a deceased partner is not liable for debts contracted after his death, and that debts contracted before that time were barred by a short local statute of limitations, both of which partnership decisions may be true enough, but are not in point in the case at bar.

Ripley v. *Sampson*, 11 Pick., 370, 372, cited by appellant, was a case under the Massachusetts statute of 1808, which did not even subject a living stockholder to any liability, except that his shares might be sold for non-payment of assessments. The court find that the case comes under the statute of 1808, and say: (The statute of 1808) "did not subject a living stockholder to a general liability "for assessments, but only authorized the company to "sell the share for non-payment of subscription." As a living stockholder was not liable under this statute, of course no liability descended to his administrator.

Bangs v. *Lincoln*, 10 Gray, 600, 606, 607, cited by appellant, is not a case of intestate and administrator, but of an insolvent and his assigns, and is decided largely upon the peculiar law of the latter relationship (page 607 of the above case.) We discuss the effect of insolvency and bankruptcy upon stock liability in the concluding portion of this brief. Again, the above case is grounded upon the local statute.

Mass. Pub. Acts, 1851–1852, Cap. 315, p. 811, follows the Dane Manufacturing Company case in its construction of that statute, and holds that a concurrent chancery procedure given by another Massachusetts statute was not intended to enlarge stock liability; it gave a choice of remedies, but not an increase of rights. The court say, on page 606: "Equity must follow the law. * * * "It would be unreasonable, if not absurd, to suppose that "the intention of the statute was that a stockholder "should be more directly and absolutely liable for cor- "porate debts in one mode of proceeding than in an- "other; that a more rigid rule should be administered "for the enforcement of such debts in equity than at law."

Chase v. *Lord*, 77 N. Y., 1, 5, cited by appellant, held that the stockholder's executor was not liable because the testator's stock was full paid, and a statement required by the New York statute to limit further liability had been duly filed in the proper office. Had the testator been liable, his executor would have been liable also, for the court say so, thus: "It is contended by the appellant: "First, that the testator was never liable; and second, "if he was liable, the cause of action did not survive "against his estate. With the second proposition we "have no difficulty. The defendants took the stock sub- "ject to any liability which existed on account of it; * "* * and if the testator was liable to pay the plaintiff's "demand, the defendants, as his representatives, are "equally so."

Why appellant cited the above case, an authority in our favor, we do not know. Having made this one unsatisfactory excursion into New York State, he hastily returns to what he considers the more congenial soil of Massachusetts, and cites

Gray v. *Coffin*, 9 Cushing, 192, 203; but this was a claim against the estate of an insolvent, and was decided upon the construction of the insolvent law. The court say (page 203): "The insolvent law is full and explicit "as to the claims against the estate of an insolvent. "(Stat. 1838, cap. 163.) * * * The plaintiff's claim "is neither within the letter nor the equity of this pro- "vision." The court also go on to say that not only the alleged debt, but the contract, out of which it is supposed to have grown, commenced after the assignment. Yet the court concedes (page 201) that had the claim been against the solvent estate of a deceased person it might have been valid: "Similar and greater difficulties might

" arise in applying these provisions " (of the Massachusetts statute 1838, cap. 98) " to the case of an executor or " administrator. The effect of the statute would seem to " charge the estate of the deceased with a liability not " higher in its nature than a debt. If the estate were " solvent, perhaps an action would lie in which the cred- " itor might have a judgment *de bonis testatoris*, so as to " charge the assets." This is all we ask in the case at bar; the national banking act directs our procedure in chancery, instead of at law, but all we ask is a decree against the administrator to pay in due course of administration, precisely equivalent in its effect to a judgment *de bonis testatoris*.

In connection with the foregoing Massachusetts case we call the attention of the court to a significant discovery: The provisions of the national banking act on the liability of executors and administrators are copied almost word for word from the Massachusetts statute commented on in the foregoing Massachusetts case.

" No persons holding stock in a corporation, as execu- " tors, administrators, guardians or trustees, shall be per- " sonally subject to any liability as stockholders of such " corporations; but the estates and funds in their hands " shall be liable in like manner, and to the same extent as " the deceased testator or intestate, or the ward or person " interested in such trust fund would have been, if they " had respectively been living and competent to act, and " held the same in their own names."

Mass. Pub. Acts, 1836-1838, page 382.

" Persons holding stock as executors, administrators, " guardians or trustees, shall not be personally subject to " any liabilities as stockholders; but the estate and funds

"in their hands shall be liable in like manner and to the "same extent as the testator, intestate, ward or person "interested in such trust funds would be, if living and "competent to act and hold the stock in his own name."

Sec. 5,152 Nat. Banks, U. S. Rev. Stat. Ed. 1878, page 995.

The coincidence is too striking to be accidental. The later law is a copy of the old one. This shows that the compiler of the national banking act, in his search for precedents, passed by the Massachusetts statute of 1860 under which it was held, in *Bacon* v. *Pomeroy*, heretofore cited, that stock liability did not survive; he disregarded the Massachusetts statute of 1808, under which it was held, in *Ripley* v. *Sampson*, heretofore cited, that there was no liability at all, except selling the shares for unpaid assessments; he disregarded the Massachusetts statute of 1851, under which it was held, in *Dane* v. *Dane Mfg. Co.*, and *Bangs* v. *Lincoln*, heretofore cited, that stock liability did not survive; but he adopted the unequivocal language of the Massachusetts statute of 1830, under which the Massachusetts court conceded in *Gray* v. *Coffin*, heretofore cited, that stock liability *did* survive; he found the Massachusetts tribunals very much hampered by the narrow statutory remedies for the enforcement of any stock liability at all, so he swept those difficulties away in the courts of the United States, by substituting the comprehensive and flexible procedure in chancery.

The Pennsylvania cases cited by appellant,

Hoard v. *Wilcox*, 47 Pa. St., 51,

Brinham v. *Wellersburg Coal Co.*, 47 Pa. St., 43,

do not bear upon the question of survival of stock liability. They are cases upon corporations organized under the Pennsylvania statute, and decide that the statutory remedy must be followed in suing stockholders, where the statute in terms said that the liability was (page 50) "to be enforced and collected in the manner provided for "in the act * * *."

Dauchy v. *Brown*, 24 Vt., 197,

cited by appellant, was decided on the same reasoning as the Pennsylvania cases, and involved no question of the survival of stock liability.

Brown v. *Eastern Slate Co.*, 134 Mass., 590, decides that where a creditor of the corporation agreed at the time of becoming such, that there should be no stock liability, he could not violate this agreement by suing the stockholders.

Pollard v. *Bailey*, 20 Wallace, 520, cited by appellant, is a decision upon a special charter of Alabama, and holds that the remedy against stockholders should have been in chancery, under section 20 of the charter, instead of at law. There is nothing in the case in reference to survival of stock liability.

Bank v. *Kennedy*, 17 Wallace, 19, holds that the ordinary resources of the bank should be exhausted before calling on the stockholders. That has been done in the case at bar.

Carroll v. *Green*, 92 U. S., 509, cited by appellant, is the construction of a special charter granted by South Carolina. There is nothing in the case about the survival of stock liability.

American File Co. v. *Garrett*, 110 U. S., 288, cited by

defendant, is next to be considered. The case was affirmed in the Supreme court, on appeal from the Circuit court of the District of Rhode Island, where it bore the title, *Garrett* v. *Sayles*, 1 Federal Reporter, 371. In the first place, this is not a decision under the national banking act, but upon a special charter granted by the State of Rhode Island. In the second place, the stock liability sought to be enforced was a penalty for not filing an annual statement in the town clerk's office. (See page 286 of the Supreme court case.) The charter of the company provides that its stockholders shall in all respects be subject to the provisions of chapters 125 and 128 of the Rhode Island revised statutes. (See volume of Rhode Island statutes, entitled "Schedules, May, 1862, June, 1863," under sub-title, "Acts of a local and private nature, May, 1863.") The schedules are not indexed down to the date of this charter, and the pages are not regularly numbered. We are unable to find the charter in a more convenient form. The chapters 125 and 128, referred to, provide: "If any of said companies shall "fail" (to file the annual statement) "all the stockholders "of said company shall be jointly and severally liable," etc.

Chaps. 125, 128, Manufacturing Corporations.
Rev. Stat. R. I., pp. 281, 297.
Chap. 155, Manufacturing Corporations.
Rev. Stat. R. I., 1882, p. 388.

This liability was therefore a penalty to enforce compliance with the statute. Penalties do not survive.

Diversey v. *Smith*, 103 Ills., 378.

Defendant is mistaken in thinking that this well known doctrine of penalties is overturned or modified in

Flash v. *Conn.*, 109 U. S., 371.

On the contrary, that case goes on the ground that the stock liability imposed by New York statute until the capital is fully paid and a certificate filed, is not a penalty but a contract, so decided in:

Wyles v. *Suydam*, 64 N. Y., 163,

and the Supreme court of the United States, as usual, adopted the state court's construction of the state statute. The distinction in facts between the *American File Co.* v. *Garrett* and *Flash* v. *Conn.*, is that in the former case the law imposed a certain duty to be done at a certain time, and said that stockholders were liable for neglect of this duty; in the latter case there was no direction to organize the corporation by a certain time, and a punishment imposed for not doing so; on the contrary, the law recognized the fact that various preliminary work must be done and expenses incurred in organizing a corporation, and this takes time, and the law only said that persons joining the corporation at the formative period assumed a temporary enlarged responsibility; there was no idea of punishing them for organizing a corporation.

In the third place, the American File Company case comes under the law of stock liability in bankruptcy and insolvency, not the law of stock liability in intestacy. Garrett had agreed to guarantee the assignee of some bankrupt stockholders against any liability on the stock, and the court decided that no liability passed to the assignee.

"We are of opinion, however, that under the statutes

" of Rhode Island, neither assignees in bankruptcy nor " the assets in their hands are liable to contribute under " the circumstances stated in the record. * * * The " general law of bankruptcy would give the same answer " to the question. * * * It is an anomaly, perhaps, " but it is an undoubted rule that assignees are not bound " to accept onerous property."

Garrett v. *Sayles*, 3 Fed. Rep., 371, 377.

" It is well settled that under the circumstances of the " case neither the assignees nor the assets in their hands " are subject to the individual liability which attaches to " stocks held by the bankrupt. * * * The same re- " sult would follow under the bankrupt law. It has long " been the recognized principle of the bankrupt laws that " the assignees were not bound to accept property of an " onerous or unprofitable character."

American File Co. v. *Garrett*, 110 U. S., 288, 295.

" Assignees in bankruptcy do not, like heirs and ex- " ecutors, take the whole legal title in the bankrupt's " property. They take such estate only as the bankrupt " had a beneficial as well as legal interest in, and which is " to be applied for the payment of his debts."

Rhodes v. *Blackiston*, 106 Mass., 334, 336.

" Assignees may refuse to take possession of onerous " properties, or such as will be a burden instead of a profit, " and the clear presumption from the bill as admitted " by the demurrer is that the claim against the trustee " was regarded in that light by the assignee. Robeson " on Bankruptcy says it has long been a recognized prin-

" ciple of the bankrupt law that the assignees of a bank-
" rupt are not bound to take property of an onerous or
" unprofitable character, or property which will be a bur-
" den instead of a benefit. They are on that subject re-
" garded as being in a very different position from that of
" the executors of a deceased testator, as the former takes
" the property by operation of law, while the latter claim
" title through their testator, and are bound to perform
" his obligations to the extent of his assets." Decision by Justice Clifford, of the United States Supreme court, assigned to the Massachusetts circuit.

Amory v. *Lawrence*, 3 Clifford, 523, 535.

In the following Rhode Island case, held that the extra liability imposed by a Rhode Island charter on full paid stock should be enforced in equity against executors and administrators of deceased stockholders.

N. E. Com. Bank v. *Stockholders of Newport Steam Factory*, 6 R. I., 154.

Deming v. *Bull*, 10 Conn., 409, cited by appellant, decided that where a Connecticut charter expressly said that corporators should be responsible " in their private ca-
" pacity " for all debts due from the company, the corporate protection was taken from them and they were liable as co-partners, for the court said that such was the meaning of the statute.

We have now completed our special comment on appellant's cases about stock liability, but before citing affirmative authorities in support of our own side of this litigation, we would make this comprehensive criticism on all appellant's cases on this subject. He has not brought forward a single decision on the specific question

whether the liability of a stockholder in a national bank ceases at his death or survives against his executor. Yet there are such cases. They are against him, and we will cite them.

The following case holds that under the national banking act, "The original liability of the intestate to pay "the assessments which may be ordered by the comptroller, was a voluntary agreement evidenced by his "subscription, or by his becoming a stockholder. It "is not imposed by way of forfeiture or penalty. It is "imposed by the statute, but it also exists by virtue "of the contract which the intestate entered into when "he became a stockholder. When the stockholder "dies, his estate becomes burdened with the same "contract or agreement which the dead man has assumed, and as long as it, through the executor or "administrator, holds the stock as the property of "the estate, and the stock has not been transferred on "the books of the bank, and the liability has not been "discharged by some act which shows that the new stockholder has taken the place of the old one, the contract "liability still adheres to the estate. This liability is not "the result of any new contract, for the administrator did "not voluntarily become the owner of the stock. It came "to him as the dispenser of the goods of the dead, and "the liability rested upon the stock, and was a part of "the contingent liability of the estate, at least until it was "transferred to some other person by a transfer free from "fraud." Judge SHIPMAN.

Davis v. *Weed*, 44 Conn., 569; 581.

"The stock is the personal property of the shareholder "(so declared by the act of Congress) having all the

"ordinary incidents of such, liable to transfer by sale and "all other means ordinarily applicable to such property. "On the owner's death it passes to his legal representa- "tives and is disposed of under the laws of the state, in "the usual course of administration." Judge Butler, United States Circuit court, Eastern district, Pennsylvania, February 10, 1880.

Hobbal v. *Western Nat. Bank.* 9 Rep., 467.

The following case seems to us decisive in support of our bill of revivor, and against Adams' demurrer. The facts were that the original shareholder did not have the stock in his own name, but to escape liability it nominally belonged to another and so appeared on the books of the bank. The original shareholder died and suit was brought against his executor to enforce stock liability. Chief Justice Waite, of the United States Supreme court, sat in Circuit, and decided the case. He cites the sections 5139 and 5141 of the national banking act in regard to stock being personal property, and as to the mode of its transfer, and he also cites section 5,152 on the liability of executors and administrators, and thus sums up: "Under "these provisions of the law, it is contended that the reg- "istered shareholders alone can be charged with the statu- "tory liability, and that an assignee of stock does not "make himself responsible unless he accepts an actual "transfer in his own name on the books. * * * "Assuming then, as I must for the purposes of this case, "that the facts were as they are claimed by the plaintiff "to have been, I cannot reach any other conclusion than "that Stevens, the decedent, was in law a shareholder of "the bank at the time of its failure, and as such, liable in "this action. It was error, therefore, to direct a verdict "for the defendant."

Davis, Receiver, v. *Stevens, Executor*, 17 Blatchford, 259, 261, 263.

It will be noted that the defendant, mentioned in the opinion, is Stevens' executor.

In the following Illinois case where the receiver of a national bank filed a claim against the estate of a deceased stockholder, it was contended that the deceased was not a stockholder, on account of some informality in the transfer of the shares to her, but the court said that she was a stockholder as far as the creditors were concerned, and her estate was held liable. "No question is "made as to the liability of the estate, if it shall be ascer- "tained that the intestate was a 'shareholder' in the "bank in the sense that term is used in the section of the "banking act cited."

Laking, Administrator, v. *Burley, Receiver*, 101, 111, 591, 593.

The English cases seems to be harmonious in support of the doctrine that stock liability survives.

In the following case there had been no formal transfer of shares to executors, but the court say: "* * * It "would be a strange result of this sort of things that be- "cause they were not nominally shareholders they were "relieved from all liability."

Houldsworth v. *Evans*, L. R. House of Lords, Eng. & Irish Appeals, 263, 285.

In the following case the deed of settlement provided that the shares of deceased proprietors should belong to their personal representatives, but that the executor of a deceased proprietor should not be deemed a proprietor

"until duly admitted as such," yet though the executors had not complied with the provisions of the deed so as to entitle them to dividends, nevertheless they were held liable for the corporate debts.

Blakesley's Case, 13 Beav., 133.

Counsel for appellant is mistaken if he claims that the English decisions on corporator's liability are all cases of unpaid subscriptions on stock.

On the contrary, the "companies' acts" for the incorporation, regulation and winding up of trading companies and other associations,

25 and 26 Victoria, c. 89,
30 and 31 Victoria, c. 131,

make the liability of corporators co-extensive with the debts of the corporation, except in special kinds of corporations.

Further authorities on the subject that stock passes to executors and administrators without formal transfer or issue of new certificates, may be found in Massachusetts, from which appellant draws most of his cases which he supposes to prove the contrary.

Thus, in the following case, there was a suit by a manufacturing corporation against the maker of a note, and defendant pleaded that the corporation was dissolved. Court say:

"As all the original stockholders are not deceased the "corporation cannot be dissolved for the want of mem- "bers to sustain and exercise the corporate powers. Be- "sides this mode of dissolution cannot apply to pecuniary "or business corporations. The shares, being property,

"pass by assignment, bequest, or descent, and must ever "remain the property of some persons, who, of necessity, "must be members of the corporation as long as it may "exist."

Boston Glass Manf'y v. *Langdon*, 24 Pick., 49-52.

"The stock, if every individual member should de- "cease at the same moment, would be distributed accord- "ing to the statute of distributions or according to the "wills of the individuals deceased."

Russell v. *McLellan*, 14 Pick., 63, 69.

In the following case the question was as to the owner- ship of certain bank stock, and the court say: "We think "the general rule of law is that where a will has been "proved and an executor has received letters testamentary "in the state of the testator's domicile, the goods, chattels, "choses in action and generally the personal property of "the intestate vest in the executor. He holds them in "*autre droit* certainly, and is bound to inventory them "and account for them, but still he has the legal interest "in them and the custody and control of them."

Hutchins v. *State Bank*, 12 Metc., 421.

In the following case where a Massachusetts statute made stockholders of banks individually liable for the re- demption of bank notes, the courts say: "Some questions "have arisen as to the liability of the different defendants, "in consequence of some peculiarity in their situation; "and for the convenience of the court they are divided "into classes. * * * The third class are holders "of stock as trustees for others, and the trust appears on

"the books of the bank, either by its being there stated "that the owners held in trust for some person named, or "the owner being described as administrator. These "also are chargeable like the two former cases. The "fourth class consists of those who hold stock as admin- "istrators of deceased stockholders. They are chargeable "as for other debts of their intestates, in their represen- "tative capacity."

Crew v. *Breed*, 10 Metc., 569, 576.

The liability of a stockholder to the amount of his stock, held a contract and a law taking it away was void, because it impaired the obligation of a contract.

Hawthorne v. *Calef*, 2 Wallace, 10.

The foregoing authorities show that stock liability under the national banking act, being a contract and not a penalty, survives against an administrator, to the extent of assets in his hands, like other pecuniary obligations of the intestate, and that it also passes to the administrator as an incident of the stock itself. To obtain all the privileges of shareholders, voting, receiving dividends and the like, a formal transfer may be necessary on the books of the bank, but liability can not be avoided by neglecting to have such a transfer made. By virtue of the letters of administration the administrator holds all the personal property of the intestate. Shares of stock are personal property. Therefore an administrator holds shares. He is consequently a shareholder, and, as such, liable (to the extent of the estate assets) in the case at bar brought against him and other shareholders. The principle that stock liability survives from its very nature is deduced from the statute and decisions, and felicitously

expressed in the opinion of the Circuit court on this branch of the case at bar: "My view is that Congress intended "to give all persons dealing with the bank the guaranty "or assurance of this shareholder's liability for the pur- "pose of giving credit to a bank organized under this "law. The capital paid in on the shares might be lost "or wasted by fraud or bad management, but this ad- "ditional shareholder's liability could not be wasted, but "remains as a fund to be resorted to for the payment of "debts when the other means of payment are exhausted; "and it would certainly very much abridge this security "if the liability of a shareholder is to cease with his death. "It seems to me to be a liability which survives against "the estate of a deceased shareholder, to the same ex- "tent as if the shareholder had, at the time he subscribed "to or acquired his stock, signed a written agreement to "pay an amount equal to the par value of the stock on "the debts or liabilities of the association when called "upon by the receiver of the bank to do so, and such an "agreement undoubtedly would survive as against the "representatives of the shareholder's estate."

VII.

THE EXPENSES OF THE RECEIVERSHIP SHOULD BE INCLUDED IN THE ASSESSMENT ON STOCKHOLDERS.

As to the point whether the expenses of the receivership should be included in the assessment on stockholders, the simple argument on this subject is that the statute says so:

"All expenses of any receivership shall be paid out of

"the assets of such association before distribution of the "proceeds thereof."

Sec. 5238 Nat. Bk. Act.

The broad term association is here employed, a collective noun denoting not only the corporation itself, but also the stockholders who compose it. Appellant's argument, that stock liability is not an asset of the bank, because the bank cannot enforce it, falls to the ground when we point out to them that in certain cases the statute not only authorizes, but directs a bank to levy an assessment on its shareholders.

Nat. Bank Act, Sec. 5,205.

Stock liability is an "asset of the bank to be resorted "to in the event of insolvency."

Irons v. *Mnfrs. Nat. Bk.*, 21 Fed. Rep., 196.

"The individual liability of the stockholder under the "statute is as much a part * * * of the assets of "the company for the payment of debts as the capital "stock."

Morrison v. *Price*, 23 Fed. Rep., 217, 221.

The comptroller of the currency includes these expenses in his assessments as a matter of course. By analogy a court would do so. The principle is the same in both cases. Indeed, this is the rule. Wherever a fund is administered by a court of equity, expenses are paid out of the fund.

These expenses are incidents of the original debts. Stockholders can stop these expenses at any time by pay-

ing up their statutory liability. Their efforts to evade this liability make these expenses exist. The evidence shows that in addition to the small allowance made six years ago, these expenses are twenty per cent. of the amount to be collected. (Page 224.) The receiver does not claim for this purpose a fixed sum, as might be inferred from appellant's argument. That sum is only predicated upon collecting the full amount of the claims against the bank (pages 224, 488); but many stockholders are insolvent and not to be found (pages 289, 290), thereby reducing the amount collectible, and reducing pro rata the collection charges. This case has now been eleven years in court, and the record shows the great labor required in carrying it to its final stages. It is a case of infinite detail, and there are as many decrees as there are stockholders. The receiver, as the common representative of the creditors, was solicitous to see that no errors crept in to any part of the case. The whole record is evidence of important, laborious and protracted services of the receiver and his attorneys in obtaining the appointment of the receiver, investigating the affairs of the bank, shaping the pleadings, getting the defendants into court, arguing demurrers, pleas and motions, taking testimony, arguing exceptions, instituting bills of revivor, and arguing the whole case in the court below, to which is to be added the preparation and trial of the case before this court. It must be remembered, also, that any payment to receiver and counsel is contingent upon success in enforcing stock liability, as the funds coming from other sources were meager (page 174), and long since exhausted (page 365.) Defendants cannot well controvert the percentage claimed, because the testimony as to its propriety is uncontradicted (page 224.) They neither cross-exam-

ined appellee's witness, nor called any witness against him. Furthermore, the allowance sought would cover court costs, office rent, printing and fees of marshal, master in chancery, commissioners and witnesses. It would defray not only the expenses of collection from stockholders, but the expenses of distribution to creditors. Appellant's exceptions in the court below do not seem to challenge the amount of these expenses, but rather challenge the allowance of any expenses at all (pages 475-472, 489); but exceptions must be specifically taken in the court below; they cannot be first raised here.

38th equity rule; Des y's Fed. Proc. (6th ed.), p. 726 and cases there cited.

VIII.

THE PROPER DECREE, IN VIEW OF THE FOREGOING HEADS OF THIS ARGUMENT.

A few stockholders could not be found, and were therefore not served in this suit. As those already in sufficiently represented all adverse interests, the cause proceeded without the ones not found (page 156). We could not obtain a decree in the present proceeding against the stockholders not found, but their exemption for the time being does not give any immunity to defendants actually served.

Kennedy v. *Gibson*, 8 Wall., 498.
Castleman v. *Holmes*, 4 J. J. Marshall, 5.
Ogilvie v. *Knox Ins. Co.*, 22 Howard, 380.

If it did have this effect, then, by a single defendant going outside the jurisdiction or keeping in hiding, all defendants would escape liability. In truth, the liability of one defendant does not depend at all upon that of a co-defendant, because the liability is expressly enacted to be several and not joint, one for another.

Sec. 5,154 Nat. Bk. Act.
Bayley v. *Sawyer*, 9 Legal News, 191.

As the suit is in the nature of a creditor's bill, to which proceeding a receiver is a customary and useful if not an indispensable adjunct, and as the fund obtained from stock liability is to be distributed for the common benefit of creditors, it is proper that this fund should be paid in the first instance to the receiver, as the common representative of all the creditors, and the decree so provides. As the liability of the stockholders is several, there is therefore properly a separate judgment or money decree against each stockholder, served.

The following was a case in which a recovery was sought from certain stockholders of an insurance company. Only part of them were joined. This court say: "[Let] the record be remanded "with instructions * * "* to enter a decree for the complainants against the "respondents *severally* for such amount as * * * "was due * * * by each * * * on their "shares of the capital stock."

Ogilvie v. *Knox Ins. Co.*, 22 Howard, 380:

"The liability of the deendants is several and not joint. "They were properly united in the same action * * * "but when the rule of apportionment was ascertained, and

" the case prepared as to any one, we do not see any suf-
" ficient reason why we should not be directed to do jus-
" tice without delaying until others can be reached."

Castleman v. *Holmes*, 4 J. J. Marshall, 5.

" Where there are several parties the court may decree
" as to one and retain the cause as to others."

McConn v. *Delaney*, 2 Bibb., 440.
Royal's Admrs. v. *Johnson*, 1 Randolph, 421.

Separate decrees against two stockholders sustained.

Munger v. *Jacobson*, 99 Ill., 349.

The equities in the case at bar are with the appellees. Those equities consist of two great facts, that the debts of the bank should be paid and that stock liability is a fund provided for that purpose. Those two equities will not down before all the refined and technical defenses which appellants have set up.

Appellants seem to feel that that the enforcement of their statutory liability is a hardship on them. On the contrary, the law is more lenient to them than to an ordinary business man. A merchant is liable to creditors without any limitation, except some small exceptions. He puts at risk substantially everything. When a commercial crisis occurs, his whole fortune may be swept away. How different is the case of the appellants. They went into banking to make money, just as a merchant goes into the dry-goods trade; the law allowed them to make all the money they could, but limited their losses to the statutory amount in excess of their investment. Instead of the

banking act imposing a liability on them, it really reduces the liability incident to ordinary business. Without this corporate shield and guard, they would be liable as partners to nearly the uttermost penny of their fortunes. Let the stockholders then with blushes withdraw their plea for sympathy. Think of the depositors. The books of the bank are a huge cemetery of ruined fortunes and every account upon its ledger is a gravestone of buried money.

Respectfully submitted.

D. J. SCHUYLER,
~~HENRY B.~~ EDWARD G. MASON,
Attorneys for Appellees.

21,927

JAN 3 1887

No. 982.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

ALONZO RICHMOND ET ALS.,
Appellants,
vs.
JOEL D. HARVEY, RECEIVER, ETC., ET ALS.,
Appellees.

JOEL D. HARVEY, RECEIVER, ETC., ET ALS.,
Appellants,
vs.
ALONZO RICHMOND ET ALS.,
Appellees.

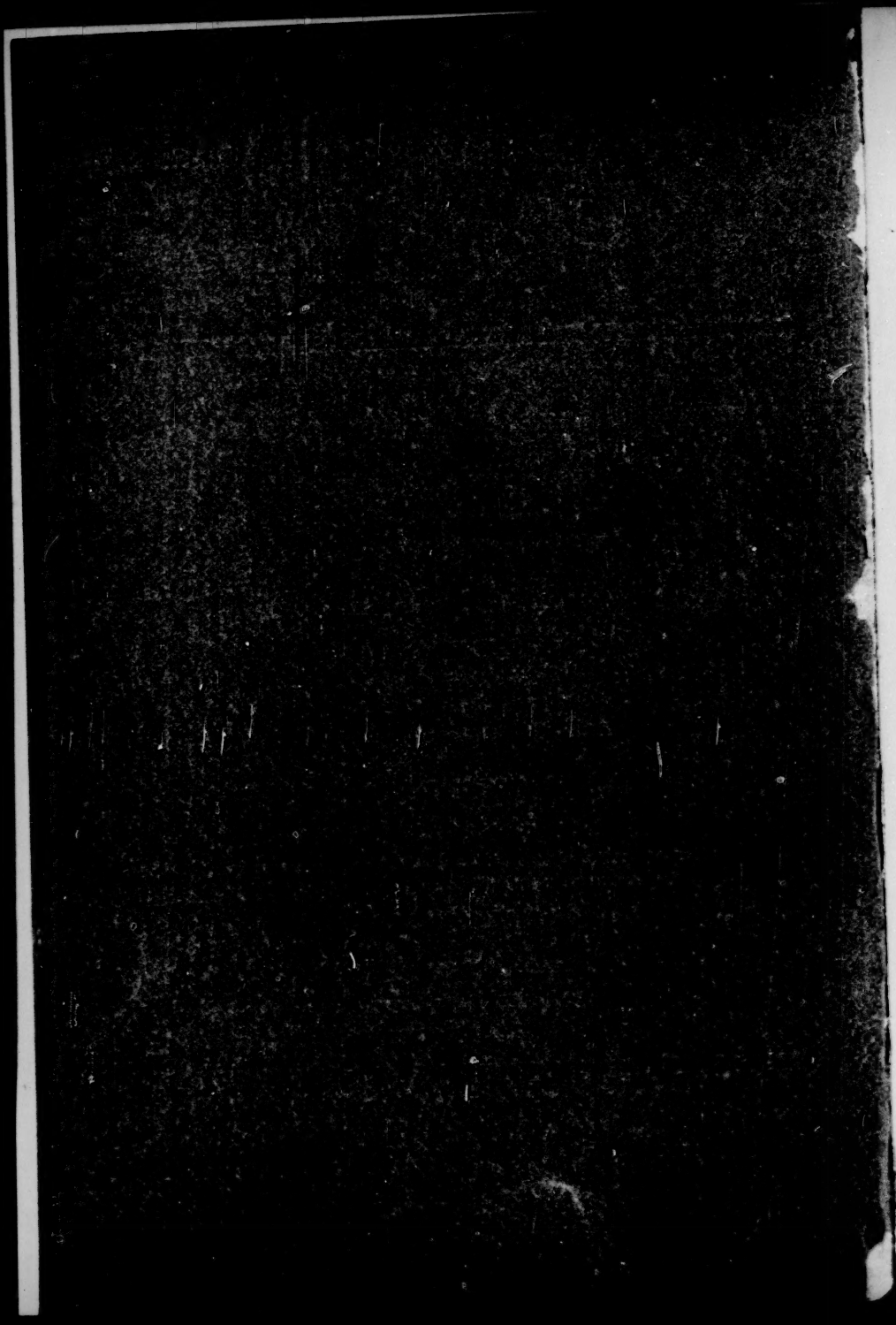
BRIEF

ON BEHALF OF IRA HOLMES AND EDGAR HOLMES, BANKRUPTS,
APPELLEES IN THE APPEAL OF JOEL D. HARVEY,
RECEIVER, ETC., ET ALS.

BY

JAS. H. ROBERTS,
ATTORNEY FOR BANKRUPTS.

BARNARD & GUNTHORP, LAW PRINTERS, 47 & 49 LA SALLE ST., CHICAGO.



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JOEL D. HARVEY, RECEIVER, ETC., ET ALS.,
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ALONZO RICHMOND ET ALS.,
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STATEMENT OF THE CASE.

September 26, 1873, The Manufacturers' National Bank, at Chicago, went into voluntary liquidation.

December 2, 1874, James Irons recovered a judgment against the bank in the Circuit court of the United States for the Northern District of Illinois.

February 3, 1875, Irons filed in said court a creditor's bill against the bank and Ira Holmes, its president, to reach the assets of the bank to satisfy said judgment.

February 26, 1875, Joel D. Harvey was appointed receiver of the bank.

October 5, 1876, Irons filed an amended bill, making stockholders of bank also defendants.

March 17, 1877, Irons died.

May 9, 1877, bill of revivor was filed by Agnes F. Irons and Andrew H. Foskett, executors.

Then various parties, creditors of the bank, filed intervening petitions and became co-complainants, and pushed the case along to its conclusion.

Various proceedings were had in this case not here stated because not essential to an understanding of the question at issue. A decree was finally entered on June 1, 1886, by the court, the Hon. Henry W. Blodgett, judge, finding in favor of the complainants, and decreeing that all of the defendants, except certain ones stockholders who had been discharged in bankruptcy, and who had interposed their discharge in bankruptcy as a defense, should pay the respective amounts as found due from them by the master in chancery to whom the case was referred.

As to these bankrupts, Ira Holmes, Edgar Holmes and Milford D. Buchanan, our clients, the bill was dismissed for want of equity. (P. Rec., 498.) *And it is with this branch of the case, viz.: whether a discharge in bankruptcy, properly pleaded and timely interposed, presents a good defense to an action to enforce stock liability in a proceeding of this kind.*

As we understand, the complainants below were entirely satisfied with the decree, except as to the bankrupts, and to be heard on that question, they prayed an appeal to this court, which was allowed (P. Rec., 503). They, however, have not complied with the terms of the court below, in that they have not filed their respective appeal

bonds as required by the court, and hence we have a motion pending in this court to dismiss their said appeal for non-compliance with the order of the court, allowing the appeal. The defendants below (except the bankrupts), where amount involved was $5,000, appealed to this court (P. Rec., 502) and brought the record here, but the complainants below, whom we designate cross appellants, have not perfected their appeal; they have not filed their bond or done anything to avail themselves of the certificate of evidence filed herein by the other said appellants. So it seems to us, as set out in our said motion, they have no standing in this court to argue this question of bankruptcy; but to be on the safe side, we have thought it prudent to present a brief on the question, viz.: did the discharge in bankruptcy present a good defense and was the bill rightfully dismissed for want of equity as to the bankrupts? It is conceded that the pleas in bankruptcy filed by the bankrupts were in due form and were filed in apt time. Those pleas will be found in printed record, pages 77, 153, 232. Those of Ira Holmes and Milford D. Buchanan were filed November 30, 1878, and March 11, 1879, respectively. They were adjudged bankrupts November, 1875, and August 24, 1878, respectively, by the District court of the United States for the Northern district of Illinois. Edgar Holmes was adjudged a bankrupt by the District court of the United States for the Northern district of New York, June 26, 1878.

ARGUMENT

We have not the brief of the cross-appellants, Harvey and others, whose appeal we have, as stated above, moved in this court to dismiss.

As the status of this appeal is somewhat peculiar, we do not know whether they will undertake to argue this question or not; perhaps they may do so in their reply brief to the briefs presented herein on behalf of Adams, Lord and Comstock, who were defendants below and who appealed and brought the record to this court. If counsel do argue the bankruptcy question they will, no doubt, follow substantially their argument below, citing the same cases, many, if not all, of which we will, in the course of our argument, refer to with comments.

The object of the bankrupt laws and the matter of contingent liability is well expressed in *Mudge* v. *Rowan*, L. R., 3 Exch., 85, 1868.

The court say:

"This case is by no means free from difficulty. *It is no* "*doubt the general object of the bankrupt laws to set a debtor* "*free from every kind of liability, capable of valuation, to* "*which he may be subject, whether his liability depends* "*upon* a contingency *or not;* but the claim made here is "very peculiar; the object of a separation deed generally "is not to secure an annuity to the wife for any definite "period, but rather to secure her an allowance for her

" maintenance, so long as the separation between herself " and her husband shall continue."

* * * * * * * *

" This being so, the annuity seems to me to be so *un-* " *certain* in its nature, as to be impossible to be valued. " In many cases the commissioner of bankruptcy may " have to deal with contingencies, the value of which de- " pend on a variety of considerations, and where the val- " uation is very difficult. *But here I am at a loss to see* " *any single circumstance upon which a calculation of any* " *kind could be based.* * * *

" The bankruptcy of a man, moreover, has nothing to " do with the duty incumbent on a man to provide for his " wife."

Blumenstiel's Law and Practice in Bankruptcy, last part of section 5,069, page 275, in edition of 1878, closes with the following:

" From all the authorities, both English and American, " the following principle may be adduced: If the debt or " liability is dependent upon a condition reasonably cer- " tain and ascertainable as to time and value (*Robinson* v. " *Persant*, 53 N. Y., 419), and such contingency either " happens, or can be reasonably calculated to happen, be- " fore final dividend, then the claim is provable, otherwise, " not. Of course the agreement or contract upon which " the contingency depends must have been made before " the commencement of proceedings in bankruptcy, al- " though the debt that is created by such future event " does not come into existence until afterwards.

" The most familiar example that can be cited is that " arising under a policy of fire insurance the contingency, " to wit, loss by fire, may never happen. It is, there-

"fore not provable. The loss, *if it occurs before final* "*dividend*, is provable, and is barred by a subsequent "discharge. If the loss should happen after the last divi- "dend has been paid, the claim is not provable, and is not "discharged."

The following cases were cited by complainants below:

Bank v. *Kennedy*, 17 Wall., 19.

The principal controversy in that case, as the court say: "Is upon the question whether the note was given "by Sherman on his own account, or on account of the "Merchants' Bank."

The court again say:

"The first and second errors assigned are, that the "plaintiff, who is a receiver appointed by the comptroller "of the currency, under the 50th section of the national "banking law, is not entitled to bring suit without the "authority or direction of the said comptroller, which is "not alleged or shown in this case, and that the action "cannot be maintained by the receiver in his own name "as such."

The third and fourth errors relate to legality of certain ruling as to evidence which took place during the trial, and upon correctness of charges to jury.

The fifth, sixth and seventh errors relate wholly to the evidence; eighth, ninth, tenth, eleventh and twelfth errors relate to charges of the court.

We fail to discover anything in the foregoing case that has any bearing upon the question before the court.

So the main question in that case was not whether stockholders are debtors of the bank or not, but where

the case has turned upon the question whether the shareholders are debtors or not, it has been decided that they are, and the liablity is in the nature of a contract.

See *Davis* v. *Weed*, 44 Conn., 569.
Hobart, Receiver, v. *Johnson*, 1 Fed. R.
Briggs v. *Penniman*, 8 Cow., 387.

French v. *Morse*, 2 Gray, 111:

This was action of contract on the covenant against incumbrances contained in a deed made by defendant to plaintiff.

The court say:

"The defendant's covenant in said deed was not until "after the discharge in bankruptcy so broken as to give "the plaintiff a cause of action thereon against him for "actual damages. Whether such cause of action would "*ever exist* was uncertain and contingent at the time when "the defendant went into bankruptcy, and also at the "time when he was discharged. At neither of those "times had the plaintiff any *existing demand* upon which "the cause of action depended on a contingency; but the "very *existence of his demand* depended upon a contin-"gency. Since that discharge the contingency has hap-"pened. The plaintiff has been obliged to pay $924 to "remove the incumbrance on his land, and he is entitled "to recover that sum in this action."

The plaintiff, not having any existing demand prior to the discharge in bankruptcy, of course could not prove a demand in bankruptcy, and hence there was nothing to be barred by a discharge.

Woodward v. *Herbert*, 24 Me., 360:

In this case a debtor was arrested on mesne process, and gave a bond in common form to procure his release from arrest; the surety in the bond then filed his petition and was decreed a bankrupt; next judgment was rendered in the action, and the bond became forfeited by the neglect of the principal to perform the condition thereof, and afterwards the bankrupt received his certificate of discharge; such certificate furnishes no defense to a suit upon the bond.

The court say:

"It is necessary to distinguish between a contingent "demand and a contingency whether there ever will be a "demand. This distinction may be illustrated by the case "of a bond made to liberate a poor debtor from arrest on "execution. In such case the existence and amount of "the debt has been ascertained by a judgment. The "surety on the bond obliges himself to pay it if the prin- "cipal does not, or does not surrender himself to the "prison keeper, or does not procure his discharge by "taking the poor debtor's oath. The obligation is to pay "a debt or demand upon those contingencies. The debt "is a contingent debt, and can be proved against the bank- "rupt. Not so in the case of a bond made to release "from *arrest on mesne process. There is no obligation "to pay the debt in any event if one should be finally estab- "lished.* It only obliges the surety to cause the principal "to do a personal act, and in case of failure to make com- "pensation in damages, *wholly unliquidated and incapable "of estimation*, before the effect produced by the failure "of performance of the personal act can be perceived. "It would seem to have been *impossible to fix any value*

"upon such a personal obligation. Upon what principle "could a court direct a valuation of the *chances that the* "*plaintiff would recover judgment, and that the defendant* "*in that suit would neglect to notify and disclose as the* "*statute required?*" * * * * * *

Ellis v. *Ham*, 28 Maine, 385:

In this case Ham was elected a constable, giving bond with plaintiff and others as sureties. One Childs got judgment against defendant at October term, 1843, for damages for official neglect of duties; not getting his judgment satisfied, he commenced suit upon official bond of defendant. The sureties settled the suit, and the plaintiff paid for defendant in November, 1845, his share of the damages.

The defense of Ham in this case is that on December 19, 1842, he filed his petition in bankruptcy; that he was decreed a bankrupt January 22, 1843, and that he obtained his discharge January 27, 1846. Held the discharge no bar, because there was no *contingent debt* due from defendant to plaintiff when petition was filed or adjudication had; there was only a *possibility* that such a claim or debt might exist at some future time.

The claim or debt on account of stock liability in the case at bar existed long prior to the time when these defendants filed their petition in bankruptcy and were adjudged bankrupts.

South Staffordshire Ry. Co. v. *Burnside*, 5 Exch., 129:

The defendant, a railway shareholder, became bankrupt February 8, 1848. On the 18th of same month a call was made, and these other calls were subsequently made. April 24, 1848, defendant obtained his certificate.

THERE WAS NO EVIDENCE OF AN ACCEPTANCE OF THE SHARES BY THE ASSIGNEES.

PARKE, B., held that, as to first call, plaintiff could not recover. "We intimated an opinion during the argu- "ment that there was not sufficient evidence to warrant "the jury in coming to the conclusion that the *assignees* "*had taken to the shares, and of that opinion we remain.*

"At the time of bankruptcy it was uncertain what the "sum would be which the defendant would be called on "to pay, and no debt was then contracted. * * * "This is *a contingency which never could be the subject of* "*valuation, depending not merely on the wants of the com-* "*pany, but ownership of the shares at the time of call by* "*the bankrupt; for if he had parted with the shares he* "*would be no longer holden, and, therefore, not liable.*"

General Discount Co. v. *Stokes*, 17 C. B., N. S., 774:

This was an action for calls by a joint stock company. The defendant pleaded bankruptcy.

BYLES, J.: "* * * but the cases which have been "referred to seem to go to this, that where the liability to "pay the money depends upon several contingencies, and "not upon a single one, the words of the section are not "satisfied. Here there are two contingencies, at least; one, "*whether a call would ever be made;* the other, *whether,* "*if a call were made, the bankrupt would, at the time, be* "*the holder of the shares.* * * * Further, if the "bankrupt be discharged, he is discharged from all the "liability that ever can happen in respect of these shares; "and then we are driven to this: *that the bankrupt will* "*hold his shares (for the assignees may not choose to inter-*

"*fere*), and yet he is freed from all liability in respect of "all calls past and future."

Financial Corporation v. *Lawrence*, 4 C. P., 731.

In the case of an English bankruptcy it is well settled that it is in the bankruptcy only of a "contributory": *i. e.*, of a shareholder who has become bankrupt since the "winding up," that future calls can, under section 75 of the companies' act, 1862, be proved for.

Hastie's Case in re General Estates Co., L. R., 4 Chan. App., 274 (1869):

"The real question is," say counsel for liquidator, "whether the calls made in this winding up were a debt "provable in the appellant's bankruptcy, for the dis- "charge only applied to debts provable under the bank- "ruptcy.

"When the bankruptcy occurred the company was a "going concern, and no calls had been made, and it would "have been impossible for the company to prove against "his estate in respect to future possible calls, under the "154th section of the Bankruptcy Act, 1861, for their "value could not be ascertained."

In this case the assignees repudiated the shares, and they remained in the name of the bankrupt.

The court says in its opinion:

"The provisions of the act of 1862 (companies' act) "do not make a debt provable which is *incapable of val-* "*uation at the date of the bankruptcy;* nor can such a "construction be in reason put upon them as would have "the effect of relieving a bankrupt in consequence of his

"discharge, though he should have been discharged "years before the winding up, *and might have been hold-* "*ing the shares and even receiving dividends subsequently* "*to his discharge.* There is nothing in this case to show "that the debt or call in respect of which the bankrupt is "made a contributory *was capable of valuation at the date* "*of his bankruptcy.*"

Had the winding up begun before the bankruptcy, then the discharge would have barred calls.

The cases *South Stafford Ry. Co.* v. *Burnside*, 5 Exch., 129. *Gen. Dis. Co.* v. *Stokes*, 17 C. B. N. S., 765, were decided under act of 1841, in which the extended definition of "*liability*" is not found, and where the act did not refer to contingent liability, but only to a debt. Afterwards, says Blumenstiel, in his Law and Practice in Bankruptcy, page 273:

"A provision was inserted making contingent liabilities "provable, and the decisions then were that the contin- "gency on which the liability depended must not be too "remote, and it must be reducible to a *matter of calcula-* "*tion, and capable of valuation.*"

In *U. S.* v. *Throckmorton*, 8 B. R., 309, the following construction has been given to section 5,068, in our own bankruptcy act:

"When the payment of a debt cannot be enforced "until the happening of some contingency, such debts be- "ing readily estimated, may be proved, or if the extent of "liability depends on the happening of a contingency, and "such contingency is reasonably certain to happen before "final dividend, the court may by some method determine "the value to be placed by the claimant on such debt, and

"admit him to prove it, but where the contingency does "not happen before final dividend, it is not provable."

In some of the English cases cited above, the bankruptcy was prior to the "winding up" of the corporation, and prior to the "calls," and where the shares did not pass to the assignees; and where there was a "contingency," as the court say, which never could be the subject of valuation.

In another of the English cases cited, there were contingencies, whether there would ever be a call, and, if there was, whether the bankrupt would at the time be the holder of the shares.

In another of the English cases, Hastie's, cited above, the assignees repudiated the shares; "when bankruptcy "occurred the company was a going concern, and no "calls had been made," held impossible for company to prove against his estate in respect of future possible calls, because act of 1862 (companies' act) does not make a debt provable which is incapable of valuation at date of bankruptcy, but if winding up had been before bankruptcy, discharge would have barred calls. This was so in *Financial Corporation* v. *Lawrence*, above cited.

Ira Holmes' petition in bankruptcy was not filed until upwards of two years after the bank failed, or the winding up process commenced, and his shares, by operation of law, all passed to his assignee, and so under the English and American decisions his discharge would bar claims on stock liability. And the same is of course equally true as to Buchanan and Edgar Holmes.

All of the cases are to the effect that the discharge is a complete defense, if, at the time of the adjudication in

bankruptcy, a right of action had accrued against the bankrupt, or if the debt is capable of valuation at date of bankruptcy.

Prior to the time when Ira Holmes was adjudged a bankrupt, the entire indebtedness of the Manufacturers' National Bank and its assets were known to all creditors of the bank. For upwards of eight months before Ira Holmes' petition in bankruptcy was filed, Mr. Harvey had been acting as receiver of the bank. He had in his actual possession the assets and books of the bank, as appears by his report filed April 5, 1875, and the creditors had full opportunity to learn fully the bank's condition. Ira Holmes filed an answer for himself and the bank to the original Irons bill April 1, 1875, which was sworn to, and contained a detailed statement of the bank's assets and liability (printed record, 19–24), and if further information was needed than was revealed by the books and the answer, it could have been had by an examination of Ira Holmes or other officers of the bank. Had a creditor of the bank desired to prove against the bankrupts' estates a stock liability, he could have done so. The percentage of their liability was ascertainable beyond controversy in ample time for that purpose, no difficulty about it whatever.

The original bill was filed herein February 3, 1875. The Manufacturers' National Bank was then insolvent. If the creditors of Ira Holmes, Edgar Holmes and Buchanan could, when they filed their petitions in bankruptcy, have maintained suits against them upon their stock liability, then their claims are barred by these discharges in bankruptcy.

Had a right of action respecting the stock liability

accrued against these bankrupts when they were respectively adjudged bankrupts?

We understand such right of action existed. The act of Congress of June 30, 1876, was not necessary in order to enable creditors to enforce their rights against the shareholders of this bank. In support of this proposition we refer to the opinion of Judge BLODGETT in this case, found in printed record, pages 257, 258 and 491–493.

If the law is otherwise, then the creditors must pocket their loss until such time as Congress should see fit to act. That time might never come, and if it did come, after the lapse of years, the claims then become stale ones, and if the shareholders are not then insolvent they would be disposed to contest the claims because they are *stale*, and the creditors would be put to greater expense and trouble in prosecuting their claims than if they had an earlier right of action in the premises, and the chances for them to lose their claims entirely by this lapse of time, or of getting a small percentage thereon, would be greatly enhanced. This is so manifestly unjust and inequitable that it cannot be the law. Now, if the creditors of the Manufacturers' National Bank had a right of action, if they could singly or alone, by a bill in equity or in any other proceeding, have maintained a suit to enforce the stock liability against the stockholders before these bankrupts filed their petitions in bankruptcy, then they could have proven their claims against their estates in bankruptcy, and their discharges would have barred them, or if the claims were contingent and they could have proved them before *final dividend, they would have been barred by the discharges.*

Complainants, in their brief in the court below, said "Sections 5,068 and 5,069, United States bankrupt act,

"provide in effect that in case of contingent liability, if "the contingency happens, or if the liability can be ascer- "tained and liquidated, it may be proven up. Neither of "these conditions were fulfilled in the present case."

What was there that was contingent about this liability?

There can be no question but what there was a liability before any of these bankrupts filed their petitions. It is useless to argue so plain a proposition. The bank was insolvent for upwards of two years, and the bill herein was filed nine months before either of these bankrupts filed his petition in bankruptcy, and yet complainants claim that the liability was a contingent one. Contingent on what, we would like to know? Certainly not contingent as to whether there would ever be a liability or not. In this respect this case is wholly unlike many of the cases we have cited, and we have referred to those cases for the purpose of showing that where a discharge in bankruptcy was held to be no defense it was upon a state of facts so different from the present case that we are fully justified in concluding, from the course of reasoning in those cases, that the court in each would have held the discharge a complete defense had the facts been those of this case.

There being, then, no contingency about the liability, was there any contingency as to the amount due? Complainants think there is not now any doubt on that point, but they have had all the information, or could have had it, which they now have upon this feature of the case long before any of these petitions in bankruptcy were filed, as we have before stated, or, at any rate, before final dividend. So we say there was no contingency as to the amount due. It was easily ascertainable.

We have attempted to show that a cause of action existed in favor of the creditors of these bankrupts before they were adjudged bankrupts, and hence that they could have proved their claims in bankruptcy; that there was no contingency as to there being a liability on the part of the shareholders; that the amount due was susceptible of ascertainment.

But suppose that it is claimed there are further contingencies which must determine before the liability of the stockholders could become capable of proof, as,

1st. Conferring upon the comptroller authority to act.

2d. His action under such authority.

We answer, for sake of the argument, if a receiver appointed by the comptroller was necessary, in order to have a person *in esse* who could prove up his stock liability against the bankrupts, then, according to complainant's theory of this case, the act of June 30, 1876, conferred upon the comptroller the authority to appoint a receiver who could fix the percentage of liability and prove up for the creditors their claims against the bankrupts. The comptroller, then, having the power to make said appointment under said act, disposes of the first contingency. The second contingency, then, amounts to nothing, because, having thus obtained authority to act, *before final dividend, which has not reference to the date of filing the petitions in bankruptcy*, if he fails to act, and if the creditors fail to avail themselves of their rights in the premises, the way being open for proving their claims, then their claims are barred by the discharges, because they had the opportunity to prove them before *final dividend*.

Suppose again, for argument, that there is or was about

proving up this stock liability some difficulty, some contingency somewhere, then even the claims are barred, because there is no difficulty or contingency in this case that is not met, recognized, provided for and obviated by the bankrupt law. In this connection we refer again to Blumenstiel's Law and Practice in Bankruptcy, last part of section 5,069, page 275, edition 1878.

Section 5,068 Revised Statutes United States, title Bankruptcy, is as follows:

"In all cases of contingent debts and contingent liabili-
"ties contracted by the bankrupt, and not herein other-
"wise provided for, the creditor may make claim there-
"for and have his claim allowed, with the right to share
"in the dividends, if the contingency happens before the
"order for the final dividend; or he may, at any time,
"apply to the court to have the present value of the debt
"or liability ascertained and liquidated, which shall then
"be done in such manner as the court shall order, and
"he shall be allowed to prove for the amount so ascer-
"tained."

For construction of this section, see *U. S.* v. *Throckmorton*, 8 B. R., 309.

Here was a way provided for the creditors if they thought their claims were contingent debts, to have their value ascertained and liquidated, but the fact is, the creditors never tried to avail themselves of any of their rights under the bankrupt law. They have had their day in court and are not entitled to another.

In the case of *Wolf* v. *Stix*, 99 U. S., 1, the Supreme court of the United States, WAITE, Ch. J., say:

"Whether the event would ever occur which would

"require the payment was uncertain; but if it did occur, "the amount to be paid was fixed. This clearly was "such a case as was provided for in Sec. 5,068 R. S. "* * * The debt thus created was provable under "the Bankrupt Act."

In Re the Elliott Felting Mills, U. S. Dist. court, Mass., July, 1875.

Opinion by LOWELL, J.:

In the course of the opinion, the court say: "The con- "tingent liabilities that courts have always refused to as- "sess are those in which it is uncertain whether there "will ever be anything to assess. (*Riggin* v. *Maguire*, "8 N. B. R., 484.) 15 Wall., 549. It is no objection "to a proof that the courts or a jury may find difficulty "in assessing damages for a breach of an absolutely "broken contract any more than that there may be com- "plications in an account; and so is the law of contingent "debts, if the contingency happens before the close of "bankruptcy. If the liability is absolute, there is no more "or less difficulty in liquidating it, and no less obligation "to liquidate it in the court of *bankruptcy* than in any "other."

In *Riggin* v. *Maguire*, cited in foregoing opinion, in 15 Wall, the opinion was delivered by Bradley, J. The court say:

"It is argued that, under the right given by the 5th "section of the bankrupt act of 1841, to prove uncertain "and contingent demands, the claim in this case could "have been proven under the act. But the better opinion "is that as long as it remained wholly uncertain whether "a contract or engagement would ever give rise to

"an actual duty or liability, and there was no means "of removing the uncertainty by calculation, such con- "tract or engagement was not provable under the act of "1841."

We refer the court to an exhaustive and interesting discussion of this question of uncertain and contingent demands in Smith's Lea. Cas., Vol. I., Part II. Notes to *Mills* v. *Auriol*, by Hare and Wallace, 7 Am. Ed., 1,227.

That the discharges in the case at bar are a good defense seems to be fairly inferable from the decision rendered by the court, BLODGETT, J., in *Flower* v. *Greenebaum*, 2 Fed. Rep., 897.

In re Baldwin, 5 N. B. R., 41, LOWELL, J., there said "that equitable claims were in the scope of bankrupt act, "that was intent of act to give all creditors an equal share "of assets without regard to mode in which rights might "have been enforced, if there had been no bankruptcy; "that as to both debtors and creditors the act is highly "remedial, and district court is vested with most ample "equitable powers to enable it to work out full remedies "to all persons."

Complainants cited below *Rhodes* v. *Blackiston*, 106 Mass., 334, in support of proposition that assignees in bankruptcy do not take the legal title in the bankrupt's property.

We understand complainants to mean that the shares of stock in this bank held by the bankrupts when they went into bankruptcy did not by operation of law pass to their assignees. If counsel had quoted a little further from that case, in 106 Mass., they would have given us this language: "They (assignees) take such estate only

"as the bankrupt had a beneficial as well as legal interest "in, and which is to be applied for the payment of his "debts."

In *Secord, Assignee*, v. *Buffalo, N. Y. & Philadelphia Ry. Co.*, 8 Reporter, 550, the court say: "Assignment in "bankruptcy relates back by operation of law to date of "filing petition, and carries with it all the property of the "bankrupt on that day; so that no person can, by subse- "quent act, defeat such title or impose any lien upon the "property."

Thompson's "Liability of Stockholders," section 244: "It may, no doubt, be stated, as a general conclusion, that "if a company comes to an end before the bankruptcy of "one of its shareholders, his certificate of discharge "shields him from all liability to contribute to the debts of "company, and also to the expenses of winding it up. "This conclusion rests upon two reasons: 1. That the "assignment in bankruptcy operates as a complete di- "vestiture of the bankrupt's title to the shares, as fully as "though he had transferred them *bona fide* for a valuable "consideration to a person capable of taking them. The "bankrupt, having thereby ceased to be a shareholder, of "course ceases to be liable as such, unless there is a "statute or rule of construction which makes him liable "as a *past member*. 2. That the sum which the share- "holder was liable to contribute for the benefit of cred- "itors was a debt provable in the proceeding in bank- "ruptcy. If both or either of these reasons fail, the rule "ceases."

There can be no question but what the shares of stock in this bank owned by these defendant bankrupts passed to their assignees, and we feel like offering an excuse for

discussing so plain a proposition, but complainants compelled us to do so.

Another case cited by complainants is *In re* May and Mervin, 9 N. B. R., 419.

In that case the court held that rent which was to accrue under a lease subsequent to the bankruptcy proceedings was not a provable claim.

Another case cited by complainants is *U. S.* v. *Rob Roy and cargo*, 13 N. B. R., 235.

The court say: "The contingency on which the "liability in this case was depending was the final decis- "ion of the case, which could not be known, anticipated "or valued by any method of discount, or any calculation "of probabilities or chances whatever."

Another case cited below by complainants is Furdoonjee's case, 3 Ch. Div., 264.

In this case the court say: "I do not see how this "liability could have been a provable debt at the time "when the insolvency proceedings commenced. There "was no *constat* that there ever would be a call on the "shares."

These last three cases do not certainly militate against the defense interposed by the discharges in this case. Upon what theory or course of reasoning the courts in these cases could have come to a different conclusion, we do not see, and we are equally unable to discover the value of those cases as authority for complainants.

The same may be said respecting the case of *Murray* v. *De Rattenham*, 6 Johns. Ch. R., 52, cited by complainants.

In that case the court say: "The taxes were contin-
"gent debts, not existing at the time of the discharge.
"They were imposed subsequently, and consequently,
"could not have been proven under the commission."'

Garrett v. *Sayles*, 1 Fed. Rep., 371, 377, and *American File Company* v. *Garrett*, 110 U. S., 288, 294, 295, we desire also to comment on, because in the argument below stress was laid upon these cases as authority in this case.

These two cases are substantially the same. The questions of law are identical, and on appeal to Supreme court were consolidated and heard as one case. (110 U. S., 288.) In the Garrett-Sayles part of the case the court, in Federal Reporter, volume 1, page 377, say:

"The peculiar statutory liability imposed upon share-
"holders in New England is not one which can be proved
"as a debt against a bankrupt's assets, unless it is liqui-
"dated and ascertained by a decree in equity before the
"time for proving debts has gone by. *Kelton* v. *Phillips*,
"3 Met., 62; *Bangs* v. *Lincoln*, 10 Gray, 600; *James* v.
"*Atlantic Delaine Co.*, 11 N. B. R., 390. It follows that
"Chapman, or the several members of his firm, according
"to the fact of ownership, would remain personally liable
"to contribute to the debts of the corporation notwith-
"standing their discharge in bankruptcy, because only
"provable debts are discharged, and because they would
"remain shareholders."

It will be observed that the court in its opinion cites *Bangs* v. *Lincoln*, 10 Gray, 600, and *James* v. *Atlantic Delaine Co.*, 11 N. B. R., 390, as authorities, being the same cases which counsel for complainants cited in their brief.

The principle involved, then in the cases of *Garrett* v.

Sayles, and *American File Co.* v. *Garrett*, is the same as in the cases of *Bangs* v. *Lincoln* and *James* v. *Atlantic Delaine Company*. And what is that principle or point involved in all those four cases last referred to? It is simply this, *that as the creditor had not exhausted his remedy as provided by the local statute, no suit could be instituted against the stockholders, and therefore the debt was not a provable one.*

Judge BECKWITH in his brief below discussed the two cases last referred to and gave a lengthy excerpt from the opinion in *Bangs* v. *Lincoln*, 10 Gray, 600, and as we have not before us the opinion but have his brief, we give here the citation and the judge's discussion of the cases.

"In *James* v. *Atlantic Delaine Company*, 11 N. B. R., "390, the petitioner sought to have the defendants ad- "judged bankrupts by reason of their contingent liability "as stockholders of the Atlantic Delaine Company, but "by the law of Massachusetts were not subject to suit, "either in law or in equity, until the creditor had ex- "hausted her statutory remedy against the corporation "and its officers. This had not been done, and as the "petitioner was not entitled to sue the alleged bankrupt, "either at law or in equity, it was held that the petitioner "had not such a debt as would enable her to institute "proceedings in bankruptcy. The case of *Bangs* v. *Lin-* "*coln*, 10 Gray, 600, referred to by the court, fully ex- "plains the ground of the decision. In the latter case the "court say:

"It is urged very strenuously in behalf of the plaintiff "that although the remedy at law against the stockholder "may be such as to show that his liability is indirect "and contingent, yet by the Revised Statute, Chapter 38,

" Sec. 31, a direct remedy by a bill in equity is given for " the enforcement of such a claim, and that under this " provision the liability may be properly regarded as con- " stituting an absolute debt of the stockholders. There " are two sufficient answers to this suggestion. It is a " misconstruction of this section to assert that it gives a " direct remedy against a stockholder, as on a debt or " charge for which he is personally liable. The remedy " by bill in equity, under section 31, is given instead of " that provided by the preceding section—that is, in lieu " of a right to levy an execution, issued on a judgment " rendered against the company on the person or property " of the individual stockholder. But it is not given in the " place of the judgment against the corporation. As such " judgment must be obtained before the creditor could " have any remedy by means of a levy of execution on the " person or property of the stockholder, so, also, he must " obtain it before he can maintain his bill under section " 31, which is only a substitute for such levy. But the " better and more decisive answer is, that the statute " of 1851 essentially modifies the right of a creditor " to maintain a bill in equity under Rev. Sts., C. 38, Sec. " 31. Equity must follow the law. The effect of the " provisions of St. 1851, C. 315, is not merely to alter the " remedy of a creditor against a stockholder, or the mode " of enforcing the debt, but also essentially to change the " nature and character of the liability. If it could have " been held to be direct and absolute under the provisions " of Revised Statutes, Chapter 38, it is clearly not so under " the subsequent enactment. The alteration in the rem- " edy involved a material modification in the right; or, in " better phrase, the legislature adapted the remedy to " enforce a right which was contingent and not absolute.

"It would be unreasonable, if not absurd, to suppose that "the intention of the statute was that a stockholder should "be more directly and absolutely liable for corporate "debts in one mode of proceeding than in another; that "a more rigid rule should be administered for the en- "forcement of such debts in equity than at law. We "certainly should not adopt any such conclusion, unless it "was the unavoidable result of the interpretation of the "language of the statute. But no such construction is "necessary. The different provisions of the statute are "susceptible of a much more reasonable interpretation. "Being *in pari materia*, the enactments are to be con- "strued together as parts of one and the same legislative "act. In this view it is clear the right or liability is the "same, whether it is sought to be enforced in law or in "equity. The statute of 1851, C. 15, so far as it affects "stockholders, is a repeal of and substitute for Revised "Statutes, C. 38, Sec. 30, which prescribed the remedy at "law in favor of creditors against stockholders. The "provision in Sec. 31 is therefore to be read and construed "in the same manner as if it was preceded by the pro- "visions contained in statute 1851, C. 315. In this view, "the remedy in equity against a stockholder is in lieu of "that which is given by proceedings at law, that is, he "may be held liable on a bill in equity, after the creditor "has failed to satisfy his judgment against the corpora- "tion by levying his execution upon the corporate "property, or upon that of the officers of the cor- "poration. This interpretation is consistent with true "canons of exposition, and harmonizes the different pro- "visions of the statute. The result is that both in law "and in equity, the liability is only a qualified and limited "one, and in no just sense a debt for which the stock- "holder is absolutely liable.

"In short, under the laws of Massachusetts, there was "no liability on the part of a stockholder until the creditor "had obtained a judgment against the corporation, and "had exhausted his remedy against the corporate prop- "erty and the officers of the corporation. For the reason "that the petitioner in the case of *James* v. *Atlantic De-* "*laine Company*, had not exhausted her remedy against "the corporation, no suit could be instituted against the "stockholders, and therefore the debt was not a provable "one."

The court below, in arriving at its decision on this question, had before it the printed brief and argument of Mason Brothers, and Schuyler & Follansbee, for the receiver and creditors, and a reply brief by Mason Brothers to the briefs and arguments on behalf of the bankrupts.

The opinion of the court is found in printed record, pages 258, 259, 260:

"Four of the defendants, stockholders, Ira Holmes, "Edgar Holmes, M. D. Buchanan and W. G. E. Pope, "have, either by plea or answer, set up their discharges in "bankruptcy as a defense in this case." On the 7th of "May, 1879, an order was entered in this case of the fol- "lowing tenor: 'And the complainants confessing the "pleas of bankruptcy herein filed by Edgar Holmes "(and the other defendants), it is ordered that this case be "stayed as to them.' It is now urged that this amounts "to a decree in favor of these defendants upon their pleas "in bankruptcy. This can, in no sense, it seems to me, be "held to be a final decree in favor of those defendants; it is "merely an order that the proceedings be stayed as to these "defendants, the complainants confessing the facts set up in "the pleas, not confessing the law or sufficiency of the

"pleas as a defense, but simply confessing the facts and "leaving it for the courts to adjudge the law upon those "confessed facts whenever the main cause should come on "for hearing.

We think the court in error in its construction of this confession.

By the confession they confessed every material averment in the pleas; everything that was averred which is requisite in a good plea of discharge in bankruptcy was confessed. Among other allegations in said pleas (P. Rec., 78) is the following: "And this defendant avers "that all of the supposed indebtedness against him as "such stockholder in said amended bill of complaint men- "tioned existed on the 3d day of November, A. D. 1875, "and was by said law made provable against the estate "of this defendant in said proceedings in bankruptcy." This is taken from the plea of Ira Holmes. The pleas of Buchanan and Edgar Holmes contain the same, except change as to date. Such an averment is a material one. The pleas are in proper form, and are drawn in conformity to the rules of this court, and contain what the decisions of the courts require, and yet it is claimed they confessed only the fact of bankruptcy.

Counsel referred us to the following:

"If upon an issue the facts stated in the plea be deter- "mined for the defendant, they shall avail him as far as "in law and equity they ought to avail him."

Eq. Rule 33, Desty's Fed. Procedure, 285.

Also, "according to the rules of pleading in the chan- "cery court, if the plea is unexceptionable in its form and "character, the complainant must either set it down for "argument or he must reply to it and put in issue the

"facts relied on in the plea. If he elects to proceed in "the manner first mentioned, and sets down the plea for "argument, he then admits the truth of all the facts "stated in the plea, and merely denies their sufficiency in "point of law to prevent his recovery."

Rhode Island v. *Massachusetts*, 14 Peters, 210, 257.

Why did counsel cite the foregoing rule and authority? They did not set down the pleas to be argued, nor take issue on them: they did nothing under said rule, and hence cannot invoke its aid.

But if the rule did apply, it would work for us all we claim. How far ought the facts stated in the pleas to avail the defendants? The facts, viz.: bankruptcy, a discharge and that the claim was a provable one, all being facts set up in the plea, and these issues being found for bankrupts, it follows the claim is barred because that point of law is admitted when issue is taken on facts, that is, when issue is taken it is admitted, if allegations of fact are proven, that the defense is complete; the question being on the facts and not upon the law raised by the pleas. Then "in law and equity," the facts being found for the bankrupts, they shall avail them fully and constitute a complete defense.

We have many authorities in support of our position, but will not present them now, but desire to do so hereafter in our reply brief, provided the court considers this question of bankruptcy before it for decision. If we are right in our view as to the effect of said order, then that ended the case, and the question whether or not a discharge in bankruptcy was a good defense was not before the court for decision.

In the same opinion, on the same pages, the opinion of the court continues as follows:

"The question then arises, do these pleas offer or pre-
"sent a sufficient defense to these defendants' liability as
"stockholders of the bank? Section 5,068 Rev. Stat.,
"Tit. 'Bankruptcy,' is as follows:

(6) "'In all cases of contingent debts and contingent
"liabilities contracted by a bankrupt not herein otherwise
"provided for, the creditor may make claim therefor and
"have his claim allowed, with right to share in the divi-
"dends, if the contingency happened before the order
"for final dividend; or he may, at any time, apply to the
"court to have the present value of the debt or liability
"ascertained or liquidated, which shall be done in such
"manner as the court shall order, and he shall be allowed
"to prove for the amount so ascertained.'"

"The facts in this case, so far as applicable to this de-
"fense, are briefly these: On February 3, 1875, the com-
"plainant filed the original bill in this case. On the 5th of
"October, 1876, the amended bill was filed, which
"brought the stockholders before the court. There has
"been a receiver in this case appointed under the original
"bill ever since February 26, 1875, and the defendants have
"all been adjudged bankrupts since the amendment to the
"bill was filed. After the apointment of this receiver,
"and especially after the amendment of the bill and en-
"largement of its scope so as to reach the stockholders, it
"was certainly competent for the receiver to have proved
"the claim in bankruptcy against these stockholders. He
"could, as readily then as now, have ascertained the
"amount of the assets and liabilities of the bank, and have
"made as close an approximate estimate of the amount
"which would have been required to be collected from

"the stockholders as he can now. The two factors for esti-
"mating the extent of the stockholder's liability, the debts
"and assets, were as well known then as now. But if he
"could not have done it at that time, if the assets of the
"bank had not been then so far converted or made
"available as to be able to show just what would be re-
"quired from the stockholders, the court of bankruptcy
"would undoubtedly have given time, and so far delayed
"the proceedings as to enable such an estimate to be
"made before closing the affairs of the bankrupt estate
"and ordering a final dividend. From the time this bank
"suspended, the only element of contingency which can
"be said to have characterized this stockholders' liability,
"so far as these defendants are concerned, was as to its
"amount. From the time these men became stockhold-
"ers they stood liable for the debts of the bank to the
"extent of the stock held by them, if it should become
"necessary to resort to such liability after exhausting the
"assets of the bank, and therefore the receiver stood in a
"position, at the time these bankruptcy proceedings were
"pending, to have proved these claims before the bank-
"ruptcy court. In *Riggin* v. *Maguire*, 15 Wall., 549, the
"Supreme court says: 'As long as it remains wholly
"unsettled whether a contract or engagement will ever
"give rise to an actual duty or liability, and there is no
"means of removing the uncertainty by calculation, such
"contract or engagement is not provable.' But here
"there was a method, as it seems to me, of removing the
"uncertainty, as to the extent or amount of these stock-
"holder's liability, by a simple calculation as to how much
"would be needed to pay the debts of the bank after
"exhausting the assets, and this balance or deficiency was
"the measure of the stockholder's liability to the extent of

"an amount equal to the amount of his stock. Without, "therefore, discussing the numerous authorities which are "cited by counsel on both sides of this case, I shall hold "that these pleas in bankruptcy are a sufficient bar in "behalf of these defendants."

The foregoing opinion was filed July 23, 1883, and on the same day was entered the interlocutory order found in printed record, pages 261–264, and in said order, page 263, we find the following: "It is further ordered, "adjudged and decreed that the discharges in bankruptcy "of the said defendants, Ira Holmes, Edgar Holmes, "William G. E. Pope and Milford D. Buchanan, barred "and extinguished their stock liability, and that they have "leave on the final hearing to move for a dismissal of the "bill as to them for want of equity." On the final hearing, Ira and Edgar Holmes and Buchanan did ask to have the bill dismissed for want of equity, as provided in the said interlocutory decree (P., Rec., 486), which was accordingly done (P. Rec., 498). On the 1st day of June, 1886, Judge Blodgett filed in this case his final opinion (P. Rec., 491), and in this opinion he again discusses this question of bankruptcy (P. Rec., 493, 494), as follows:

"*The question as to the effect of the decree "of the discharge in bankruptcy interposed by the "defendants, Ira Holmes, Edgar Holmes, M. D. "Buchanan and Pope, has also been rediscussed, and "the case of Garrett v. American File Co., 110 U. S., "288, decided and reported since this question was formerly "up, is now presented as holding a contrary rule from that "which I adopted in disposing of these pleas, but after an "examination of that case I do not see that it should in any "way be allowed to change the conclusion which I have*

"heretofore announced. The decision upon these pleas
"was placed mainly upon the peculiar facts in the record.
"It appears, as I have already said, that the bill to enforce
"the liability of the shareholders of this bank was filed Oc-
"tober 5, 1876. These four shareholders did not get their
"discharges, and their estates were not closed until long
"after the amended and supplemental bill was filed. Their
"individual liability as shareholders of this bank, whatever
"it was, had become fixed. The debts of the bank were a
"fixed quantity; the amount of stock which these
"shareholders respectively owned was easily prov-
"able and the complainant or the receiver who had
"been appointed under the original bill in the case might
"have proven this claim for individual liability against
"the estates of these bankrupts at any time after this bill
"was filed. It could have been proved in the name of this
"complainant creditor or in the name of the receiver. It
"is true that the court had not by a decree fixed the amount
"of assessment to be made against these shareholders, but
"the claim perhaps might have been proven for the full
"amount of the stock, as it was known at this time that a
"very large assessment from the shareholders would be re-
"quired for the purpose of paying the debts of the bank.
"It is true an assessment had not been actually made, but a
"bill had been filed which must sooner or later result in an
"assessment, and a tentative proof could have been made,
"and hence I think this claim of liability was a provable
"claim and not a contingent claim at the time these pro-
"ceedings in bankruptcy were commenced. It may be that
"a shareholder in a solvent bank continuing in the due
"course of business, and where the question of his ever be-
"ing made liable is a remote contingency, would not be re-
"leased from liability by a discharge in bankruptcy; but in

"this case the only contingency there was consisted merely "in the amount of assessment which would be required "upon these shareholders, and a court in bankruptcy could "have heard proof as to the amount of the debts of the bank "and the amount of stock, in order to settle the amount of "the shareholders' liability."

It will be seen from the foregoing opinions that the court first decided this bankruptcy question in July, 1883, and upon that decision the interlocutory decree was entered; and again, the court passed on the question on final hearing June, 1886, it having been re-argued by counsel since the opinion of July, 1883. It is apparent, then, that this question was fully discussed and well considered by the court. The court had entire charge of all bankruptcy matters in the Northern district of Illinois. It was entirely familiar with the law and administration thereof, and we can rest assured that the decision in this case is supported by the law and the facts, and we submit that it should be affirmed. Respectfully,

JAS. H. ROBERTS,
Att'y for Bankrupts.

121, 27

No. 982.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

ALONZO RICHMOND, CHARLES COMSTOCK, THOMAS LORD AND WILLIAM HENRI ADAMS, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WILLIAM H. ADAMS, DECEASED,
Appellants,

vs.

AGNES IRONS ET AL.,
Appellees.

Appeal from the Circuit Court for the Northern District of Illinois.

REPLY TO ARGUMENT OF APPELLEES.

H. G. MILLER,
M. W. FULLER,
H. B. HURD,
FOR APPELLANTS.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

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Appeal from the Circuit Court for the Northern District of Illinois.

REPLY TO ARGUMENT OF APPELLEES.

At the time the amendatory act of June 30, 1876, became a law, the bill of complaint in this case was in the form of a creditor's bill, and had for its object the discovery and appropriation of the assets of the bank to the payment of the complainants' judgment. The prayer is that so much of the assets of the bank as may be necessary for that purpose "may be applied to the payment of "the amount due, upon the said judgment of your orator "in full, both principal and interest." Other creditors of the bank are not so much as referred to in this bill, nor is the liability of the stockholders even suggested. An exhibit was filed on the same day the bill was filed, containing the names of the stockholders, their residence and

the number of shares held by each of them, but we do not find that this exhibit was refefred to in the bill or in any manner made part of it. We will concede that the creditors could at the same time have filed a bill against the stockholders to enforce their statutory liability. As was said by this court in *Pollard* v. *Bailey*, 20 Wallace, 525, the provision in the banking act, section 5,151, that shareholders shall be individually responsible, "equally "and ratably," "is equivalent to a provision for an ap- "priate form of equitable action to enforce it." The creditors had two remedies, one by creditors' bill to reach the assets of the bank and the other by a bill against the stockholders to enforce the obligation to the creditors they impliedly assumed in becoming stockholders of the bank, and these separate proceedings could have been prosecuted at the same time by any creditor until he had obtained full satisfaction of his claim. By the amendatory act of June 30, 1876, the national banking act which created this liability of the stockholders to the creditors of the bank as thus amended contained a provision for enforcing it in cases where banks had gone into voluntary liquidation, and this remedy and this alone could thereafter be pursued by the creditors against the stockholders. It could only be enforced "by "any creditor of such association by bill in equity in the "nature of a creditor's bill, by such creditor on behalf of "himself and of all other creditors of the association against "the shareholders thereof in any court of the United States "having original jurisdiction in equity for the district in "which such association may have been located or estab- "lished." This creditor's bill was afterwards and on the 5th of October, 1876, amended. It is not claimed that the pleader who drew that amendment intended to place

the proceeding under the act of June 30th. On the contrary, upon the supposition that the sums due from the stockholders were assets of the bank, and that his client would be rewarded for his diligence by the payment in full of his claim out of these assets, he purposely refrained from making it a bill on behalf of all the creditors, and in his prayer simply asked that his own judgment be paid in full out of the fund paid into court, and that "the balance "be distributed among the other creditors of said bank in "such way and manner as your Honors shall direct." After the bill was thus amended the receiver under the creditor's bill continued to collect in assets of the bank and pay them out under the orders of the court, and March 1, 1880, he had a balance in his hands of $2,005.41 (Rec., 174). The bill as amended moreover charged that a large number of the stockholders, naming them, had sold out their stock to Holmes, the president of the bank, and had received in exchange therefore property and assets of the bank, and asked that these sales be set aside and that which had been received in exchange for the stock, be accounted for and paid over to the receiver. What disposition the receiver has made of the balance of the assets does not appear, as we can find. In the interlocutory decree of July 23, 1883 (page 204), the master is directed to take proof and report the value, if any, of the assets of the bank. It is certain that the proceeding has retained the character of a proceeding by an ordinary creditor's bill down to the time of the entry of the final decree June 1, 1886. We think we have already shown in our former briefs that the proceeding was not placed under the act of June 30, 1876, by the amendment made in October of that year; that the bill could not be treated as a bill filed under that act until

it was further amended at the hearing July 23, 1883; that that amendment was made for the distinct purpose of placing the proceeding under that act; that the statute of limitations continued to run to that time in favor of the stockholders against all claimants, including the complainant, because until then there was no proceeding in which claims against the stockholders could be presented. We never contended that there was any limitation upon the power of a court to amend the bill either in the course of the proceeding or at the final hearing for the purpose of reaching assets of the bank, that being the object for which the bill was filed.

The court below at the final hearing in May, 1886, sustained the amendments made in October, 1876, and in July, 1883, on the ground that the moneys due from stockholders under their statutory liability were assets of the bank, and therefore that these amendments did not change the character, but simply enlarged the scope of the bill. And in all the cases cited by the learned counsel for appellees, where amendments were allowed, these amendments were connected with the substance of the case made by the bill, and in no instance did they constitute a new case separate and apart from that stated in the bill. *Pannell* v. *Lamar Ins. Co.*, 73 Ill., 303, and *Derrick* v. *Lamar Ins. Co.*, 74 Ill., 404, were to enforce payments of subscriptions to the capital stock of the company, and leave to amend was not asked for in either case. In *Veale* v. *Veales*, 9 Wal., 1, the court say at page 9, by Mr. Justice DAVIS: "It is unnecessary in the view we have taken of the "power of the court over amendments at the hearing, to "discuss the question, whether the amended bill is materi- "ally different from the original bill. It is enough to "know, if different, that the subject matter of both bills

"is the same." And this language seems to have been repeated in the case of *Battle* v. *Mutual Life Ins. Co.*, 10 Blatch., 417. In the argument of counsel for appellees, on page 26, we are represented as having cited *Harper* v. *Union Manufacturing Co.*, 100 Ill., 225, and *Moore* v. *Reynolds*, 109 Mass., 473, upon the power of the court to amend at the hearing, whereas they were cited for the purpose of showing that by the amendment of October 5, 1876, the proceeding was not placed under the amendatory act of June 30th of that year, because it was still a bill by the complainant in his own behalf, and not on behalf of himself and the other creditors of the bank. (Hurd's brief, 60; Miller's brief, 30.) If the learned judge who heard the case was correct in his conclusion that the money due from the stockholders, under their statutory liability, was an asset of the bank, then these amendments were properly made. But our contention was and is now that these moneys due from stockholders were not assets of the bank; that they belonged to the creditors of the bank, and that the bank had nothing to do with them. The only authorities cited in favor of the proposition that the liability of a stockholder to the creditors of the bank are *Irons* v. *Manufacturers' N. Bank*, a decision made in a branch of this case, and language in *Morrison* v. *Price*, 23 Fed. Rep., 217, 271, which was used with reference to the proceeds of collections made by a receiver appointed under section 5,234 of the banking act. Our contention was that the only way for the creditors to proceed against the stockholders to enforce their statutory liability was by a new bill under the statute of 1876, and framed in the manner required by that act, and not by amending a bill filed before that act was passed, for the purpose of reaching

assets of the bank. Counsel for appellees say in their brief (page 27): "The object and scope of "the bill was the collection of the liability of the stock-"holders, and the prayer was for accounting, etc., and "its distribution among the creditors of the bank pro "rata. The bill had but one purpose, and the prayer "was not inconsistent with that purpose." The counsel here look at the bill in one of its aspects only, namely, as a bill to enforce the statutory liability of the stockholders. But the amendment which gave to the bill this aspect is to be considered as having been incorporated into, and as forming a part of, the original bill. *Hurd* v. *Everett*, 1st Paige Ch. R., 124. The proceeding has never been divested of the character given to it by the original bill. And in determining the object and scope of the bill, it is to be looked at in both aspects—as a bill to reach the assets of the bank, and as a bill to enforce the statutory liability of the stockholders. The original bill in this case was a creditor's bill, pure and simple, and its object was not to wind up the affairs of the defendant, The Manufacturers' National Bank, but to obtain payment of complainants' judgment out of its assets. And so far as its credits or intangible property is concerned, it merely subrogated the complainant creditor to the place of the debtor, and garnisheed the debts due to the indebted corporation.

Hatch v. *Dana*, 101 U. S., 111.
Patterson v. *Lynde*, 112 Ill., 204.
Hinckling et al. v. *Wilson*, 104 Ill., 63.

The complainant therefore, in this proceeding, which is in the nature of an equitable attachment of the debts due the bank, like the receiver of an insolvent corporation, must make his title through the corporation.

The law is well settled that the receiver of an insolvent corporation cannot enforce payment of the statutory liability of the stockholders to the creditors of the corporation, because his trust relates only to corporate assets, and not to assets which belong to creditors, individually, or as a body. (Hurd's brief, 39, 40; Fuller's brief, 23-26; Miller's brief, 24, 25.) The assets reached by a proceeding by a creditor's bill go in the first place to the complainant in the bill as a reward for his diligence, and then to intervening judgment creditors who have exhausted their remedy at law, while the sum due the creditors under the statutory liability of the stockholders is divided equally among the creditors, without regard to whether they have recovered judgments against the bank or not.

Out of the assets gathered under a creditor's bill and brought into court the costs of the proceeding, including the costs of the receivership, can be paid, while in a proceeding against the stockholders they can only be charged with the taxable costs of the suit.

White v. *Knox*, 111 U. S., 784-788.

And yet the court has in this case not only charged the stockholders with $4,437.04 for past services of the receiver and his attorneys (page 290), but has placed upon them the additional burthen of $69,346.52 for the expenses of the receivership, making in all $73,783.56 which the stockholders are required to pay for expenses alleged to have been incurred in the proceedings by creditor's bill, whereas they could not have been required to pay any of them in a separate bill filed in behalf of the creditors as a class under the amendatory act of 1876. It should be observed that the receiver is a mere officer of

the court, and was never directed to employ attorneys, and that the services rendered by the attorneys were in fact rendered for their clients and not for the receiver.

We think we have shown that the proceeding by creditor's bill to reach the assets of the bank, and a proceeding by creditors to enforce the statutory liability of the stockholders are separate and distinct; that they involve several matters of different natures and that therefore their *subject matter* is not the same, and for this reason they cannot be united in one bill or record. We think we have shown furthermore, that in a proceeding by an ordinary creditor's bill the court has no jurisdiction to enforce the statutory liability of stockholders; that the complainant in such a bill stands in no better position than a receiver appointed by the court of an insolvent corporation, and must make his title to everything he obtains in such a proceeding through the defendant corporation.

Counsel for appellee say, at page 27 of their brief: "A "bill in the nature of a creditors bill was certainly a legal- "ized mode of enforcing this liability, before and after the "amendment of June 30, 1876, and necessarily involved a "variety of parties and a diversity of interests; to assume "that such a bill is or could be multifarious, requires a "strength of the imagination,and an insight and knowledge "of chancery procedure, which we candidly confess we "do not possess." Here the counsel assume that the amendments made the bill a bill *in the nature of a creditor's bill*, filed under the act of June 30, 1876, and for the single purpose of enforcing the statutory liability of the stockholders, and, viewed in that aspect alone, they do not see how it can be regarded as multifarious. Our position was that its multifariousness, consisted in engrafting

by amendment upon an ordinary creditor's bill, filed long before this amendatory statute was passed, the bill to enforce the statutory liability of stockholders provided for in that act, and the objection we made was to uniting the two proceedings in one bill; that the bill as amended contained these two characters: the one an ordinary creditor's bill, filed by one creditor in his own behalf to reach the assets of the bank, and the other a bill in the nature of a creditor's bill, filed in behalf of the creditors, as a class, against all the stockholders to enforce the payment of money due not to the bank but to the creditors of the bank. Counsel have cited no case in which a proceeding to reach the assets of a corporation and a proceeding to enforce the statutory liability of its stockholders have ever been united in one bill. We have not met with one, and we do not think one can be found. Very likely the corporation may have been made a defendant in a proceeding against the stockholders, but only for the purpose of determining the amount due from the corporation to its creditors. But the act of June 30th does not require this, and we do not think in a bill filed under that act against the stockholders, it would be proper to make the bank a defendant. There are numerous cases of an ordinary creditor's bill against a corporation where stockholders have been made defendants to enforce the payment of their subscriptions for stock, but uniformly on the ground that the money thus due was an asset of the bank, and several cases of this character have been cited by counsel for appellees in their brief. The separate nature of the proceedings is recognized in *Bank* v. *Kenedy*, 17 Wal., 19, where it is said to be the duty of the receiver to collect the assets of the bank without consulting the controller, but that in enforcing the

liability of stockholders he must act under the direction of the controller.

The stockholders are certainly entitled to legal proof of the claims they are called upon to pay, definitely ascertaining their respective amounts. Each creditor should be required to show by legal proof the character and amount of his claim against the bank *at the time it went into liquidation*, before he can call upon the stockholders to pay it. At the time of the hearing in March, 1886, upon the exceptions to the master's report, filed January 2, 1885, the only proof in support of claims aggregating $185,119.26 (Miller's brief, page 62) was commercial paper the bank had received in the course of its business, which was turned over to these claimants by its officers, endorsed or guaranteed in the name of the bank, after it went into liquidation, and in many instances where creditors preferred it the paper of Holmes likewise endorsed or guaranteed by the bank. The claims were founded upon these endorsements and guaranties. The only evidence offered by the claimants to show the amount due them at the time the bank went into liquidation, were the portions of the bank ledger showing the state of the accounts with them at that time, and the transactions that afterwards took place between them and the bank. All this paper was time paper, and some of it bore interest at eight per cent. and some of it at ten per cent. per annum. Judgments had been recovered in favor of a larger portion of these claimants against the bank upon these endorsements and guaranties, and the master in his report adopted these judgments, which included interest at the rate specified upon the face of the paper, and costs, as the amount due the claimants at the time the judgments were respectively rendered, and computed interest at the rate

specified upon the face of the paper to the 1st of November, 1884, upon the endorsements and guaranties which had not been put in judgment. At the hearing, in March, the case was referred back to the master under a direction, *to compute from the proofs already taken*, the indebtedness of the bank at the time of the failure thereof, subsequent actual payments thereon, with interest upon the net amount at six per cent. per annum to the time of the re-reference. The direction was not to compute from the proof already taken in the case, and such further proof as might be offered, the amount due each creditor or claimant, as of the time the bank failed, and compute the interest thereon, less subsequent payments, at six per cent. per annum, but to ascertain from the evidence already taken the amount the bank owed at the time of the failure, etc. The only evidence in the case upon the subject of how much the bank owed at the time of the failure, and how much was paid upon this indebtedness, is found in the testimony of Ira Holmes and the books of the bank. Holmes says (page 333):

"I think the books showed that we owed $30,000 "when it was turned over to Harvey" (which was February 12, 1875, page 151), "and that we owed when we "commenced voluntary liquidation, a little over a million "dollars," and he goes on to state how he liquidated or paid off the claims against the bank, over and above the $30,000, by paying money and turning over the commercial paper of the bank and his own paper to its creditors, and he gives the then commercial standing of the makers of the paper, and says (page 340): "The fall in real "estate is what broke them up, Walker, Prickett, and "the whole of them."

"They were large dealers in real estate in 1872-'73,

"when there was a boom in real estate, and then it com-
"menced to fade away. It commenced to go down so as
"to affect the solvency of these parties in 1874 and 1875."
After his attention had been called specifically to the paper that had been given in evidence in payment of these claims, he says, on page 340. "This paper you have read off
"to me of course represents the tail end of about a million
"of paper; all the good paper of course was promptly
"met, maturing in thirty, sixty or ninety days. Several
"hundred thousand dollars was turned out and all
"promptly paid. This was paper got in by the bank
"being compelled to take real estate to save a debt, and
"then to sell it on the best terms we could. There is no
"piece of paper at the time I did not believe was per-
"fectly good, knowing some of it might be a little slow,
"but I considered it perfectly good." Again he says, on the same page: "Up to the fall of 1875, I think, I gave
"my notes generally in three, six, nine and twelve months.
"In a good many cases I paid all, in others three or four,
"and in other cases but one, sometimes. I think I gave
"$180,000 of paper, and paid all but $40,000. I took
"$180,000 paper from the bank, but never collected but
"$100,000. I thought every dollar of it was good, but
"$80,000 of it proved bad."

The bill as amended October 5, 1876, charges that the then indebtedness of the bank (page 27) was $40,000 or thereabouts. The books of the bank were given in evidence (pages 194, 195).

Joel D. Harvey, in speaking of these accounts as found in the books of the bank, says (page 206): "Their pro-
"cess of keeping the accounts as ascertained by an exam-
"ination of the books after taking possession, was they

"made settlement with A, B and C, turning out notes or "bills receivable of the bank, they charged the man's ac- "count, balancing the account and crediting Bills Receiv- "able Account; in that way closing up his account so that "the books show all their accounts to have been balanced." Question. "In case the bank turned out notes indorsed "or guaranteed by them, would the books show the "account of that particular creditor as settled?" Answer. "Yes, sir." Question. "It would not show any liability "remaining?" Answer. "No, sir."

He says on page 201, that the indetedness of the bank as shown by its books when he was appointed receiver, was $28,586.24, and on page 207, that this sum represented the aggregate of the accounts that had not been closed.

George R. Quinn, book-keeper, says, page 194: Question. "Suppose, for instance, a bank had an "account with the Manufacturers' National Bank "for $10,000, and that was settled after the Manu- "facturers' Bank went into voluntary liquidation by "cash $1,000, and the turning out of notes for $9,000. "How would that appear on the books? Would not that show that the account was balanced?" Answer. "Yes, sir." Question. "As far as the books show, all "liability would be gone, then?" Answer. "Yes, sir." And it appears that the accounts from the ledger put in evidence were all of them, with the exception of the account of the Third National Bank, of St. Louis, balanced at the time Holmes testifies the several settlements were made with these parties by paying money and turning out commercial paper. Yet the master in his final report (page 487), finds that the indebtedness of the bank at the time

of its failure, which he fixes as the 23d day of September, 1873, "amounted in the aggregate to four hundred and "ten thousand and sixty-four dollars and ten cents "($410,064.10); that the subsequent actual payments "upon said indebtedness amounted to the sum of two "hundred and thirteen thousand and eighteen dollars and "forty-six cents ($213,018.46); that the net amount of "the indebtedness was the sum of one hundred and ninety-"seven thousand and forty-five dollars and sixty-four cents "($197,045.64); that the interest upon said last men-"tioned sum, from the 23d day of September, 1873, when "the bank failed, to the 21st day of May, A. D. 1886, at "the rate of six per cent., is the sum of one hundred "and forty-nine thousand six hundred and eighty-six dol-"lars and ninety-eight cents ($149,686.98), making the "total unpaid indebtedness of said bank the sum of three "hundred and forty-six thousand seven hundred and "thirty-two dollars and sixty-two cents ($346,732.62)," and this with the further sum of $69,346.52 for the expenses of the receivership, is made the basis of the final decree.

We do not see how the master could, from the evidence in the case, have reached this conclusion. The amount that was due these creditors whose claims we contest, *at the time the bank went into voluntary liquidation*, was not the subject of the investigation before the master and had not been inquired into, for none of them had been presented in that form. They were based upon guaranties and endorsements made in the name of the bank upon the commercial paper turned over to these creditors after the bank went into liquidation, and only in that form were these claims presented to the consideration of the court in this proceeding against the stockholders.

And if the decree below is affirmed the result will be that the stockholders will be required to pay this large sum for the benefit of parties, the larger portion of whom have never established by competent proof their claims against the bank.

We said (Hurd's brief, page 29), that there was a large number of claims that could not be allowed on the basis of the reference, and that the allowance was too large by $50,000 or more. The appellees controvert this position. We, therefore, have made a further examination of thsee claims.

In his report filed January 2, 1885, the master finds that the indebtedness of the bank, including its liability upon indorsements and guaranties upon commercial paper which had not been paid, including interest, costs, etc., was, November 1, 1884.....	$368,971 50
And in his last report filed May 27, 1886, he finds that the net indebtedness of the bank, without taking into consideration this commercial paper, was at that time.....	346,732 62
Only $22,238.98 less than when its liabilities upon this commercial paper was taken into the account.	
In the first report the claim of Aaron Wilcox & Co., November 21, 1884, was allowed for.....	17,592 86
This was not a valid claim against the bank (Hurd's brief, 21) and there was no evidence of its existence when the bank failed. The same may be said of the First National Bank of Hastings' claim No. 52, which was allowed for.....	20,143 04

Claim No. 14, in favor of Grundy County Bank, is allowed for 7,757 13

This was not in existence when the bank failed. (Miller's brief, 79.) The claims allowed Third National Bank of St. Louis, Nos. 2, 3, 4, 36, 37, aggregate $15,230.87. R. Lionberger, testifying in behalf of the bank (page 371), says the amount due this bank when the Chicago bank failed was $11,273.74; that his bank was paid $5,293 in cash and balance in notes of third parties. The balance, $6,000, with interest at six per cent. to November 1, 1884, amounts to $10,026, being $5,204.87 too much. (See Hurd's brief, 32.) 5,204.87

Claim 38, in favor of Charles Goldsberg, is allowed for 1,678.10

But there is no evidence that he was a creditor of the bank at the time of the failure. (Hurd's brief, 29, 30.) The claim No. 24, in favor of National Bank of Lawrence, is allowed for 4,730.34

It is based upon the guarantee made in the name of the bank upon a note dated February 10, 1875. There is no evidence connecting this note with anything the bank owed at the time of the failure. (Hurd's brief, page 20.)

Smart's & Gudzell's claim No. 4 allowed for . 4,151 99

The claim is based upon the guaranty by the bank of three notes, one for $500, dated August 15, 1873, the other two, one for $2,000, dated December 30, 1873, and one for $500, dated January 10, 1874. They had no

account with the bank; and the only evidence connecting these notes with the amount due from the bank at the time of the failure is that of Daniel O. Smart, who says at page 387: "I regard my claim against the bank as "founded upon the deposit to our firm's credit "at the time of the failure of the bank," but he does not say, and it nowhere appears, how much the credit was.

The claim in favor of D. O. Mills & Co., No. 5, is allowed for $9,539.52, as due November 1, 1884 (page 287). Holmes says that the amount due to D. O. Mills & Co. from the bank at the time of the suspension was $5,037.65 (page 345). The claim is founded upon three notes, one for $2,000, and two for $1,000 each, made by Samuel J. Walker, and endorsed by the Manufacturers' National Bank (pages 297, 298). Holmes says (page 244) that these notes were turned over to D. O. Mills & Co. on the 30th of November, 1873, in settlement of their account, and they gave the bank a check for the amount standing to their credit, and the balance, of course, was paid in cash. The three notes, with interest at six per cent. from November 30, 1873, to November 1, 1884, amounts to $6,620, which is..... 2,919.52
Less than the amount allowed in the master's first report.

The amount allowed the First National Bank of Allegan, claims No. 45 and 46, is $6,928.06. Holmes says (page 345) that the

indebtedness of his bank to the Allegan bank, at the time of the failure, was $3,617.08, which, with interest at six per cent. to November 1, 1884, would be $6,029.01, being . . less than the sum allowed in the master's first report. Holmes further says this account was settled by turning out notes, and that the Allegan bank gave his bank a check for the amount standing to its credit upon the books of his bank. The ledger account given in evidence (page 299) shows that this account was balanced July 1, 1874. Benjamin D. Pritchard, who testifies for the Allegan bank, (page 420) does not deny this statement of Holmes. He says that he accepted these notes made by Holmes, and guaranteed by the bank, after inquiring of bankers as to the solvency of Holmes, and he does not deny that the notes were received in extinguishment of the amount to his bank's credit when the Chicago bank failed. 899 05

Claim No. 8, in favor of Caldwell, Hamilton & Co., is allowed for $1,951.73. Ira W. Holmes says (page 346) that when his bank failed it was owing Caldwell, Hamilton & Co. $434.71, which, with interest to November 1, 1884, amounts to $742.41, which is less than the sum allowed in the master's first report. 1,209 32

Claims 9, 10 and 11, in favor of the Union National Bank of Oshkosh, as allowed, aggregate $9,220.39. These claims are based upon three notes made by Ira Holmes, one dated Au-

gust 20, 1874, for $1,900; one dated February 17, 1874, for $1,925.50, and one dated February 17, 1874, for $1,925.50, and all endorsed by the Manufacturers' National Bank. The only evidence in the case in support of these claims is the judgments recovered in favor of the Oshkosh bank against Holmes (pages 300 and 301). Holmes says (page 347) that he turned over these notes to the Oshkosh bank in payment of the balance of their account February 17, 1874, and received therefor a check for the amount then standing to the credit of the Oshkosh bank. This is not denied by any testimony in favor of the bank. The notes themselves do not appear to have been put in evidence. The ledger account put in evidence (page 300) shows that this account was balanced February 17, 1874.

Claims Nos. 15 and 16, in favor of the National Bank of Vandalia, as allowed, aggregate $5,051.50. Holmes says (page 349) that he settled the account with this bank January 12, 1874, by turning over to the bank the note of S. M. Nickerson for $2,000, and the note of S. J. Walker for $1,000, and paid the balance in money and other notes, and the ledger account given in evidence by plaintiff (page 303) shows that the account was balanced February 12, 1874.

Claim No. 17, in favor of Mexico Southern Bank, is allowed for $8,586.62. Holmes says (page 350) when his bank failed it owed the Mexico $6,012.49, and October 8, 1873, his

bank endorsed over to that bank the note of Henry E. Pickett for $3,950, running for five years, and interest notes payable semi-annually, in settlement of the account. The ledger account put in evidence (page 304) was balanced October 8, 1873, as stated by Holmes. J. W. Carson testifying for the Mexico bank (page 396) says, that he, as the cashier of that bank, accepted $2,535.55 in cash, and the above note of $3,750, in settlement of the amount due his bank, $3,750, with interest at six per cent. from October 8, 1873, to November 1, 1874, amounts to $6,238.12, which is..... 2,347 80
less than the amount allowed by the master in first report.

Claim 23, in favor of Farmers' and Planters' Bank of Baltimore, is allowed for..... 3,852 44
This claim is founded upon the indorsement by the Manufacturers' National Bank of a note for $2,000, made by Samuel J. Walker, dated August 5, 1873. No judgment was ever recovered against the maker of the note, or steps taken to charge the endorser as required by the laws of this state. Holmes says (page 352) that this note was endorsed over to the Baltimore bank January 12, 1874, in settlement of their account; that the balance was paid in paper or cash, and that he received therefor a check from the Baltimore bank on the Manufacturers' bank. Richard Cornelius, cashier of the Baltimore bank, says (page 394) simply that he took the note

of S. J. Walker in January, 1874. He does not say that it was not received in payment of the amount due his bank, and that his bank did not give a check therefor as stated by Holmes.

Claim 28 in favor of Scott & Wigley is allowed for..... 4,445 97

The claim is founded upon a deficiency decree given in evidence (page 309), in favor of Scott & Wigley, against the Manufacturers' National Bank, as evidence of a note made by Henry E. Pickett. Holmes says (page 354) that this note was given in part settlement of this account September 25, 1873. It appears in the bank ledger account put in evidence (page 309) that this account was balanced September 25, 1873. It does not appear that the steps, as required by the statutes of this state, to charge the endorser, were taken.

Claim No. 30 in favor of the Chatham National Bank is allowed for..... 8,157 18

The only evidence in support of this claim is a judgment recovered by the Chatham bank against Sparrow M. Nickerson as maker of a promissory note for $4,500 dated May 2, 1874, payable four months from date with interest at ten per cent. In the description of the note it appears to have been endorsed by the Manufacturers' National Bank (page 310). From the account given in evidence (page 311), the Chatham bank owed the Manufacturers' bank at the

time it went into liquidation, $5,492.39, and whatever change took place in the account was by reason of transactions that took place between the banks after the Chicago bank went into liquidation. George M. Hurd, (page 378) says this note was given in renewal of a note for the same amount, dated September 13, 1873, which the Chatham bank had discounted. If so, the amount due from the Chatham bank at the time the Chicago bank went into liquidation more than covered it. Moreover, the necessary steps to charge the endorser under the laws of this state were not taken. (Hurd's brief, pages 21, 31.)

The claim in favor of F. M. Davis, No. 31, is allowed for $3,778 75

This is founded upon a promissory note mad by Ira Holmes, for $1,000, dated February 20, 1874, and endorsed by the Manufacturers' National Bank. Davis had no account with the bank. (Page 311.) This note was given several months after the bank went into liquidation, and no steps were taken to charge the endorser.

Claim No. 33, in favor of John Klein, is allowed for $488 01

This is based upon the guaranty by the Manufacturers' National Bank of the promissory note of Brainard T. Smith for $269.87, dated October 28, 1875, which was after the failure. (Page 312.) It does not appear, from the evidence, that the bank was owing Klein anything at the time of the failure.

Claim 44, in favor of Joseph Penn, assignee of People's Bank of Belleville, was allowed in master's first report (page 288), for $84,103.48. This claim is based upon the endorsement or guaranty by the Manufacturers' National Bank of eight promissory notes of Henry E. Pickett, dated August 8, 1873, for $5,000 each. (Pages 317, 318.) It appears that these notes were secured by a mortgage or trust deed upon property which had been filed for record. (Page 318.) These notes bore interest at ten per cent. per annum, and interest was allowed at that rate to the entering of judgment, May 31, 1880, and interest at six per cent. afterwards, until the filing of the report. In *White* v. *Knox*, 111 U. S. Rep., 785, it is held that all the creditor can claim of the stockholders is the amount the bank owed him at the time it failed, with interest upon the amount from that date, so as to produce uniformity and perfect equality in the distribution of moneys collected from stockholders, under their statutory liability to the creditors of the bank.

The interest upon these notes, $40,000, at six per cent., the rate allowed to other creditors, from the 26th of September, 1873, to the 1st of November, 1884, with the principal added, is $66,616.64, which is..... $17,486 84
less than the amount allowed by the master in his first report.

Claim 49 in favor of Exchange National Bank, New York, is allowed for..... 18,574 09

This claim is founded upon the endorsement by the Chicago bank of five promissory notes for $1,000 each, dated August 5, 1873 (page 319), made by S. J. Walker. The steps required by the statute of Illinois to hold the endorser were not taken. The account with this bank was put in evidence by the complainant. (Page 319.) It appears that the business between the two banks was carried on to October 24, 1873, and large payments passed from one to the other after the Chicago bank went into liquidation, and that the New York bank owed the Chicago bank at the time the latter went into liquidation $7,031.13. This was over $2,000 more than enough to pay the five notes at that time, and this claim, therefore, should not have been allowed.

Claim 41, in favor of Field, Benedict & Co., is allowed for 545 05

This is founded upon a promissory note for $269.87, made by Brainard T. Smith, endorsed by the Manufacturers' National Bank, and dated October 28, 1873, nearly thirty days after the bank went into liquidation. As Field, Benedict & Co. had no account with the Manufacturers' National Bank, it does not appear that that bank was indebted to them in any sum whatever when it went into liquidation. And H. H. Husted & Co., from whom they appear to have received the notes, have never made any claims against the stockholders, and, moreover, no steps were taken to charge the endorser.

Aggregating $123,615 10

Aside from the question whether the commercial paper turned over was received by creditors as payment of claims against the bank, it appears that the sum of $368,971.50, stated in the first report made by the master (page 288) as the amount of the claims allowed, and which should be paid by assessment upon the stockholders, was too large by $123,615.10. Consequently the sum of $346,732.62, which the master in his last report stated as the sum which the stockholders were required to pay to the creditors of the bank, which was only $22,238.88 less than the sum stated in the first report, was too large by $101,376.22.

Of course allowance should be made for the longer period for interest when the last report was made. This would be very much reduced by a closer examination of all the claims allowed, and the exclusion of ten and eight per cent. interest upon a large portion of them, allowed in the first report by the master.

In the exceptions filed to the first report (pages 475-485), the amount allowed each creditor is excepted to, and another exception is "that the said master has found "in favor of and allowed an amount due from said defend-"ants largely in excess of the sum necessary to pay all "the debts proven, and such allowance is therefore in-"equitable and unjust." These exceptions were refiled to the last report made by the master, in which he found that the unpaid indebtedness of the bank at the time it went into liquidation, which he fixed at the 23d of September, 1873, was $346,732.62, including interest at six per cent. to the date of his report, which we insist was at least $75,000 larger than the amount due at that time.

Had the master been directed to find, even from the

evidence already in the case, the amount due from the bank at the time of the failure to each creditor who is prosecuting his claim against the stockholders, less subsequent payments, with interest upon the balance at a uniform rate of six per cent., the burden upon the stockholders would have been, we think, $75,000 less than that placed upon them by the master in his final report. And we think it would have been still less if further proof had been taken upon this point. Upon the first reference the master was required to "hear proof and report the "amount of the debts of the bank still unpaid, and "the amount due each creditor thereof, the value of "the assets of the bank still available for the payment "of such debts, and the amount of assessment necessary "to be made on each share of the capital stock, in order "to fully meet the indebtedness." (Page 364.) Under this reference the master regarded judgments against the bank as conclusive evidence of the indebtedness of the bank. And in his report of the evidence taken under that reference he finds the amount due the several creditors on the 1st of November, 1884. By the last reference (page 487) he was directed to compute, *from the evidence already taken in the case*, the indebtedness of the bank at the time of the failure, less actual payments upon such indebtedness, with interest at six per cent. upon the net amount from that time to the date of the reference. (Page 487.) Under neither reference, therefore, was evidence taken of the amount of the indebtedness of the bank at the time of its failure, or of the amount due each creditor of the bank at that time.

Counsel for appellees in their brief, page 53, say that the judgment in favor of the National Bank of Hastings was recovered not only on the $5,000 note, but also on

the open account given in evidence. (Page 309.) The account attached to this judgment, taken from the books of the Chicago bank, shows that its account with the National Bank of Hastings was balanced January 12, 1874, and Holmes in his testimony (page 354) says that his bank on the 12th of January, 1874, transferred to the Hastings bank this note in part payment of their account, and that the balance was paid either by paper or cash, or both; and this statement is not contradicted by any evidence in behalf of the Hastings bank. That bank, therefore, must be regarded as having acquiesced in the truthfulness of this statement. If so, the amount due this bank at the time of the failure, had been wholly paid. Anyway this note was the only item of proof in evidence in this proceeding against the stockholders, for, as we have already shown, they are not affected by the judgment against the bank, and this note with interest at six per cent. from January 12, 1874, to May 27, 1886, the date of the last report, amounts to $8,712.50, which is $11,431.14 less than the amount allowed this bank by the master in his first report.

Counsel in their argument, page 41, say that, assuming that the notes had been taken in payment, the transactions would be set aside and the original claims reinstated because the notes were taken under a concealment of material facts, to wit: that certain stock had been transferred. These transfers did not affect the rights of the creditors or affect in the least the value of their claims, either as against the bank or the stockholders, for they have been set aside; and even if the creditors had the right to have their claims reinstated, they have made no proof of what they were at the time the bank went into liquidation.

Certainly the creditors could not have their original

claims restored until they had offered to return the notes and commercial paper they had received in payment of these claims, and making some proof of fraud and imposition practiced upon them which induced them to take the paper in payment of their claims. There is not only no proof of any such fraud or imposition, but not even any allegation thereof to be found anywhere in the record.

Counsel refer to the affidavits made by the several parties, found on pages 424–474, as containing offers to restore this commercial paper. These affidavits appear to have been sworn to during the month of January, 1884, and to have been filed January 6, 1885. (Page 474.) This was more than ten years after the settlements took place, and the original claim was for the second time barred by the statute.

Counsel say, on page 44 of their brief: "All the "claims in this suit have already been established as "against the bank, and consequently stockholders cannot "dispute them. Most of the claims have been reduced "to judgments against the bank (pages 292–320), and all "of the claims were admitted by the bank from the fact "that it has been defaulted (pages 157–262.) Having "established these claims to be debts of the bank, we by "that very fact make the stockholders liable because the "statute says in express terms that they are responsible "for the debts of the bank." (See 5151 Nat. Bk. Act.) And they cite as their leading case in support of this proposition *Slee* v. *Bloom*, 20 Johns., *669, *684. They omitted to state that this case was reviewed and overruled in *Moss* v. *McCullough*, 5 Hill, 131, and that it was there distinctly held that in an action by a creditor against a stockholder, the judgment obtained against the corporation could not be used as even *prima facie* evidence of the

genuineness or validity of the debt. We do not feel called upon to say anything more upon this point than we have already said in our briefs. It seems that the master in both reports took the view of the case urged by appellees.

Counsel say on page 47 of their brief: "No exception "was taken to his not naming individual creditors, and no "exception was made claiming that he had made any "material error in the computation to be corrected by the "court." He was not required in the order of reference to find the amount due each creditor at the time of the failure of the bank, and we have assigned as error this omission in the order of reference, and one of our exceptions, refiled to the master's report, was "that the sum "found by the master in his report as due from the de-"fendants is largely in excess of the sum necessary to pay "all the debts proven, and such allowance is therefore in-"equitable and unjust." (Page 477.) The court overruled this exception (page 497) and this ruling of the court is assigned as error. It is also assigned as error that the court erred in directing the master in the order of reference of May 21, 1886, to compute *from the proofs already taken in the case*, the indebtedness of said bank at the time of the failure thereof, while it appears in the order of reference under which the proofs had been made, that this fact was not made a subject of investigation, and consequently no evidence had been given for the purpose of establishing it.

We suppose that in determining whether creditors are entitled to interest upon their claims the court will look to the statute of the state in which the claim originated and became due, and in this instance to the statute of the

State of Illinois. We do not think it necessary to repeat what Mr. Fuller has said on that point in his argument. (Pages 52, 53.)

Limitations.

Counsel for appellees contend, on page 56 of their brief, that creditors may intervene by presentation of claims as well as by filing petitions to be formally made parties, and cite *Derrick* v. *Lamar Ins. Co.*, 74 Ill., 404, and *Pennell* v. *Lamar Ins. Co.*, 73 Ill., 303. But the position we take as to the statute of limitations does not depend upon *the form* in which creditors presented their claims, but upon *the fact* that the largest part of these claims were not presented at all until the bar of the statute had become complete. The cases above cited were upon a creditor's bill seeking to collect *unpaid stock subscriptions* as part of the assets of the insurance company, which they were. (Entirely unlike enforcing the personal liability in issue here.) And in Derrick's case, 74 Ill., 404, the court approves of *Strike* v. *McDonald*, 2 Harr. & Gill., 191, in which it was held that the statute of limitations ran against claims until presented, whether by petition or voucher.

The learned judge who heard this case, in his opinion (page 493) treats the bill as amended in October, 1876, as having brought all the creditors of the bank before the court, and as a bill for their benefit as much "as if they "had been complainants or parties to it in any form," and "that therefore if the statute of limitations had begun to "run in favor of the bank against its creditors, the filing "of this bill was the bringing of a suit by each creditor "so as to suspend the running of the statute." We cannot understand why the filing of such a bill should have

any different effect in this case from what it has in any other case under our rules of chancery practice. And we do not find a case anywhere holding that the filing of a bill by one creditor in his own behalf against the debtor suspends the running of the statute against the claims of other creditors of the same debtor.

We endeavored to show in our former briefs that the statute then running against the claims of the other creditors would continue to run against them until they should come in with their claims by petition to be made parties, or present them to the master to be proved up under the decree; and with the utmost respect for the learned judge, we do not think his ruling on this point was correct, and as the counsel for appellees do not attempt to sustain it, we will say no more upon that subject.

The answer which counsel make to this defense is that in pleading the statute the defendants asserted that *all* the claims were barred by the five years, statute, and if it should appear that *any* claim was not barred, the plea was bad for having alleged too much, and the pleading must therefore fall even as to claims that were barred. We think the learned counsel are mistaken as to the statement of this defense in the pleading.

In Richmond's answer (page 244), "the said defend-"ant, in answer to the complainants' bill, as amended, "says that the supposed liability of the said defendant, "as a holder of shares of stock in the said association, "did not accrue to those persons, creditors of said bank, "on whose behalf complainants, by their said amendment, "claimed to bring said suit, *or any or either of them.*" In the other cases the defense of the limitation was set up to "the complainant, and those on whose behalf they, "by their amendment, claim or bring suit, *or any or either*

"*of them.*" (Rec., 246.) The case was then referred to the master to take proofs, report, etc., (page 261) and by stipulation (page 326) it was stipulated that "the evi- "dence theretofore introduced before the master may be "considered as re-introduced this day" (6th day of De- "cember, 1883), "under the last order of reference by the "parties who originally introduced it in evidence." Our position is that the case as it stood prior to the amendment of July 23, 1883, was not a proceeding against the stockholders; that it was made such a proceeding for the first time by the amendment of that date, and that these stockholders were not affected by anything that therefore had transpired in the case, and this view is in harmony with the action of the court in referring the case to the master to take proof of the indebtedness of the bank without any reference to the proof that had theretofore been taken, and with the action of counsel for the respective parties in introducing into the case by stipulation of the 6th of December, 1883, the evidence that had been taken prior to July 23. If our view is correct, then all the claims against the stockholders, including the complainants, are barred by the statute. But we do not think that it was necessary to plead the statute as against any claims other than complainant's claim, and that this defense could be made to the other claims when they were presented to the master. Until then there was no pleading in the case to which the defendants could make this answer. We understand that the law is well settled, that when a person other than the complainant in the suit presents his claim before the master, the defendant has the right to the benefit of any defense, including the statute of limitations, which he could have made if a bill had been filed by the complainant in equity, or an action had been

brought at law to establish such claim. (Hurd's brief, page 27.)' This defense was promptly made as the claims were presented and expressly stated in the exceptions filed to the master's report and overruled by the court.

It is next claimed as a defense to the statute (page 59) that the stockholders had made fraudulent transfers of their stock, "and these transfers had to be set aside be-"fore the statute began to run," and they cite in support of this position *Scoville* v. *Thayer*, 105 U. S., 143. That was an action to enforce unpaid subscriptions to capital stock. The stockholders had paid in but twenty per cent. of the amount subscribed, and entered into an agreement with the company that no further assessments should be made thereon, and certificates for full paid shares were issued to them. It was held that stockholders were liable to existing creditors to the full extent of the unpaid eighty per cent. of their stock; that an assessment was necessary to give to the creditors a right of action against them, and that before this could be made it was necessary that the agreement should be set aside; "that "until an order of such court to that effect and an assess-"ment or some authorized demand upon the stockholders "to pay the balance due on his stock, no cause of action "accrues against him."

When a subscriber to the capital stock of a company pays only a certain percentage of the amount with the understanding that he is to make no further payment until called upon under an assessment, fixing the percentage of the further sum to be paid in by the stockholders, he cannot of course be required legally to pay any further sum until such assessment is made. We presume that the subscription in this case was

of that character. That was a case to enforce the payment of a subscription to the capital stock of the company, and the court simply held that the defendant was not liable until the claim was put in the form of a legal demand upon the stockholders. This is an action to enforce the statutory liability of stockholders, and we think we have shown that an action could be brought by the creditors of the bank against the stockholders when the liability of the stockholder becomes fixed, in the sense that the creditor may without obstruction proceed against him. This he can do as soon as the corporation is insolvent and fails to pay the creditor's demand. It is not necessary that the creditor should delay proceeding against the guarantor until he has pursued his remedy against the principal debtor to exhaustion, but he can proceed against him at once if the debt is not paid at maturity. Upon the failure of the bank the creditors had an immediate right of action against the stockholders, and the statute began to run upon their claims against the stockholders from that time.

Terry v. *Tubman*, 92 U. S., 156.
Carroll v. *Green*, *id.*, 509.
Godfrey v. *Terry*, 9 U. S., 171.
Baker v. *Alton Bank*, 9 Metc., 182 197.

Section 5,234 makes the controller the assignee of the bank upon its failure to pay its circulating notes, and invests him with the power and devolves upon him the duty, as such statutory assignee, to collect in the assets of the bank and, if necessary, to pay the debts of the bank to enforce the liability of the stockholders.

In *Kennedy* v. *Gibson et al.*, 8 Wallace, 505, this court explains the duties of the comptroller appointed under this

section. The court say: "It is for the comptroller to de-
"cide when it is necessary to institute proceedings
"against the stockholders to enforce their personal lia-
"bility, and whether the whole or a part, and if only a
"part, how much shall be collected. These questions
"are referred to his judgment and discretion, and his de-
"termination is conclusive. The stockholders cannot con-
"trovert it. It is not to be questioned in the litigation
"that may ensue. He may make it at such time as he
"may deem proper, and upon such data as shall be satis-
"factory to him. This action on his part is indispensable
"whenever the personal liability of the stockholders is
"sought to be enforced and must precede the institution
"of suit by a receiver." In *Bank* v. *Kennedy*, 17 Wal., 22, the court is speaking of the powers and duties of a receiver appointed by the controller under this section of the act, and when they say: "They (the stockholders)
"are only conditionally liable for those debts after all the
"ordinary resources of the bank have been exhausted,
"and they ought not to be prosecuted without due regard
"to the circumstances of the case," the meaning evidently is that the controller ought not to cause suit to be instituted against the stockholders until he is satisfied that the assets of the bank will not be sufficient to pay the debts of the bank. The court is here speaking of the duties of the statutory assignee of the bank as prescribed in the law under which he is acting.

We do not see how counsel can insist that the final decree against the stockholders is in the nature of an assessment upon the stock; and that the statute begins to run in their favor from the time the decree is entered, when the object of the statute, if properly invoked, is to prevent the further prosecution of the suit in which the decree is entered.

Counsel insist that in putting the bank in liquidation the stockholders waived the statute of limitation, that by that act they placed themselves in a fiduciary position towards the creditors. Counsel say: "By their own action "they pledge themselves to faithfully administer all avail- "able funds for the payment of debts." "A creditor has "every reason to believe, therefore, that all resources, in- "cluding stock liabilities, will be drawn upon if necessary "for the purposes of liquidation. He knows that liquida- "tion is a matter of time, and hence waits patiently for "months. How much his confidence will be abused if the "extension of time which he gives to stockholders and "really at their own request to pay him, is made by them "a bar to payment. In the present case creditors were "lulled into a false sense of security by the resolution of "the stockholders of the bank, that it is for the best in- "terest of the stockholders and depositors alike that its "affairs be placed in voluntary liquidation, and by the "cheering assurance of the officers that the affairs of the "bank can be liquidated more successfully and expedi- "tiously through their own efforts than through any other "course, and they will make all possible and justifiable "efforts to that end." We cannot see how the stock- holders changed their relation to the creditors of the bank by exercising the right the statute gave them of placing the bank in liquidation. In this case the bank owed over a million when it failed. During the first year after the bank failed, creditors came in and were paid out of the assets of the bank in liquidation of their claims, and gave their checks for the amount standing to their credit on the books of the bank, and in this way reduced the indebtedness of the bank to $38,586.24. (Page 309.) The creditors whose

claims were thus liquidated, do not pretend that they were deceived or misled in regard to the character or value of the assets they received from the bank, the fullest opportunity was given them to make inquiries in regard to the solvency of the parties whose names were to the paper offered to them, and some of them had made enquiries, and this is not a proceeding to undo those settlements. On the 4th of February, 1875, James Irons, a creditor, who refused to take anything but money in payment of his claim, having recovered a judgment, filed a creditor's bill against the bank, and within a few days, through a receiver, took possession of the remaining assets of the bank. If the stockholders were trustees for the creditors of the bank, what was the subject matter of the trust? Not the assets of the bank, certainly, for even the bank had no longer control of them. The creditors had taken possession of them down to the last dollar. Was it the money they owed the creditors under the statutory liability? Then every debtor is a trustee of his creditor in respect of the money he owes him, and cannot avail himself of the statute of limitations.

As a final answer to this defense counsel for appellees insist (page 65) that by reason of the amendment of the bill in October, 1876, and the amendatory act of June 30 of that year, the running of the statute of limitations was arrested as to all the claims of the creditors of the bank against the stockholders. We have endeavored to show, and think we have shown, that the proceeding was not placed under section 2 of that act by the amendment, and was placed there for the first time, if at all, by the amendments of July 23, 1883. Long before this amendatory act was passed the rule was well established that when one per-

son brings a suit in equity in his own behalf and in behalf of all composing the class to which he belongs, the statute of limitations runs against the claim of each person belonging to the class until he presents his claim or in some manner makes himself a party to the proceeding. There is nothing in the act to show that the legislature in passing it intended to disturb this rule. The remedy provided by this act was given to the creditors as a class to be enforced "by a bill in the nature of a creditor's bill brought "by a creditor on behalf of himself and all other credi- "tors of the association against the shareholders thereof." This remedy must be considered as having been provided in view of established rules governing proceedings in equity in the class of cases to which it belongs, and it should be administered in conformity with these rules. While the statute did not lay down any rule of practice, it did not change or modify any existing rule. Nor did it declare the effect of a bill filed under it, but the bill will have the same effect that other bills of the class to which it belongs have, that is, of bills filed by one person in behalf of all who are in the same situation with himself. Counsel, on page 66 of their argument, have brought to the knowledge of the court the fact that they were for a time experimenting with other remedies than the one they are now pressing, in a case against a single stockholder. As this matter is wholly outside of the record the court is reviewing, we do not feel called upon to say anything about it.

The evidence shows that a large number of these claims, were in fact liquidated by the officers of the bank before the bank went into the hands of the court's receiver, that the holders of them took the obligations of third parties in lieu of what the bank owed them at the time the bank went into liquidation, and in

most instances gave to the bank their checks for the amounts standing to their credit on the books of the bank, and their accounts as they appear on the books of the bank given in evidence by complainants were closed. Unless some fraud was practiced upon these parties, then these liquidations must stand, and the stockholders cannot be called upon to pay these claims when they have already been paid by the bank. They certainly should not be required to pay them until the settlement with and payment by the bank are annulled in an appropriate proceeding makng their validity the subject matter of enquiry. No such steps have been taken. It is not charged anywhere that these creditors were deceived by anything that was said to them by the officers of the bank. The stockholders placed the bank in liquidation, and should have the benefit of all liquidations made until they are set aside in a proceeding instituted for that purpose. We do not say they could not be set aside under a bill filed in behalf of the creditors, under the act of June 30, but there must be allegations in the bill and proofs directed to that object. There are not only no such allegations in this bill, or proofs made with that object in view in this case, but it was not and could not have been made the subject of investigation under either of the references to the master. Indeed, the court below held that the stockholders are bound, by the endorsements and guaranties made by its officers in the name of the bank after its stockholders had placed it in liquidation, regarding the officers as "having ample au- "thority to continue the regular course of the business of "the bank, notwithstanding this act of the stockholders." (Opinion, 495.)

If these creditors had either in this or another bill sought to set aside these settlements they would have

been required to put the bank or the stockholders *in statu quo*. It will be remembered that in these settlements the creditors took Holmes' notes for $180,000 and allowed him to take that amount of the assets of the bank, $100,000 of which he has collected. To entitle themselves to a decree setting aside these settlements they would have been obliged to bring back this $180,000 of paper they by their express assent, allowed Holmes to take, or at least the $100,000 in cash he had collected. This, of course, they could not do, and therefore they have not undertaken to do it, but instead only offered to return Holmes' notes. It is their own misfortune if they have put themselves in an attitude in which they cannot do justice to the stockholders.

Comstock's Case.

The appellee's counsel (brief, page 67,) say: "Mr. "Comstock's answer admits that the bank suspended "payment September 22, 1873." What he admits is that it suspended "on or about" that date, but he does not pretend to know the exact date. He further says that no meetings of stockholders was held to his knowledge before the bank went into voluntary liquidation, and that he has no knowledge of any action being taken in relation thereto by the officers, stockholders, or directors of said bank; that he had no knowledge of the exact date when the bank went into voluntary liquidation, and that he knew of no change of officers, etc., except that he had sold his stock and ceased to be a director. He also says he was not informed that the bank had suspended until after that step had been taken. It is quite evident that when Mr. Comstock made that answer he supposed from

what he had heard that the allegation of the bill that the bank had suspended on the 22d was true, and that therefore he might be held upon the fifty shares he continued to own until the 23d; and it is quite as evident from the testimony that his information was as much at fault as was Mr. Irons' when he alleged the suspension as having taken place on the 11th of October, 1873, or Mr. Harvey, who relates hearsay, which avails nothing as against the certain knowledge of those who knew the facts, or against the course of the bank on the 23d, 24th and 25th of September, as shown by its books. As to the 100 shares of Mr. Comstock's stock, they had been sold long before there was any trouble, and the certificates for fifty shares sold to Holmes, delivered to him in February, 1873. He being the transfer officer, it was his duty to make the transfer upon the books. The other fifty shares had been delivered to Maynard, and such efforts made to have them transferred as he thought sufficient. There is no doubt the other fifty shares were transferred on the 24th September to Holmes two days before the bank suspended, and a long time before the claimants settled with the bank, taking its paper, guaranties and endorsements.

If the complainant's counsel had desired to cross-examine Mr. Comstock (page 71); why did they not call him? They called for and got his answer under oath, and evidently did not have the necessary evidence to overcome it, but they might at least have asked to be allowed to further examine him if they had thought proper.

Railing v. *Ira Holmes* has little to do with the merits of this case. He testified to what he knew of his own knowledge, and is supported by entries made at the time in the books of the bank—the *res gesta* with the transac-

tions themselves. If he went down before the ruin that swept over the country in 1873 to 1875, it is no reason for impugning his veracity.

Adams' Case.

The reason given in the cases cited by appellee's counsel for holding the executor or administrator on the statutory liability of a stockholder, is either that he became the legal owner of the stock by operation of law or contract. In the case at bar this reason is wanting. The stock was transferred to Jonas Hutchinson October 27, 1873. (Rec. 1173.) William Henri Adams, administrator, never was the legal or equitable owner of this stock. If he is held for the contracts and debts of the bank, both before and after that transfer, it must be upon some doctrine not yet announced.

He does not come within the description of persons contained in section 5152, United States Revised Statutes, for he never became a "person holding stock" in the Manufacturers' National Bank "as administrator."

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H. B. Hoge,
Attorneys for Appellant.

121,27

JAN 3 1887

No. 982.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

ALONZO RICHMOND ET ALS.,
Appellants,
vs.
JOEL D. HARVEY, RECEIVER, ETC., ET ALS.,
Appellees.

JOEL D. HARVEY, RECEIVER, ETC., ET ALS.,
Appellants,
vs.
ALONZO RICHMOND ET ALS.,
Appellees.

MOTION

TO DISMISS ON SHORT RECORD, THE APPEAL OF JOEL D. HARVEY, RECEIVER, ETC., ET ALS., ON BEHALF OF IRA HOLMES AND EDGAR HOLMES, BANKRUPT DEFENDANTS, BELOW.

BY

JAMES H. ROBERTS,
THEIR ATTORNEY.

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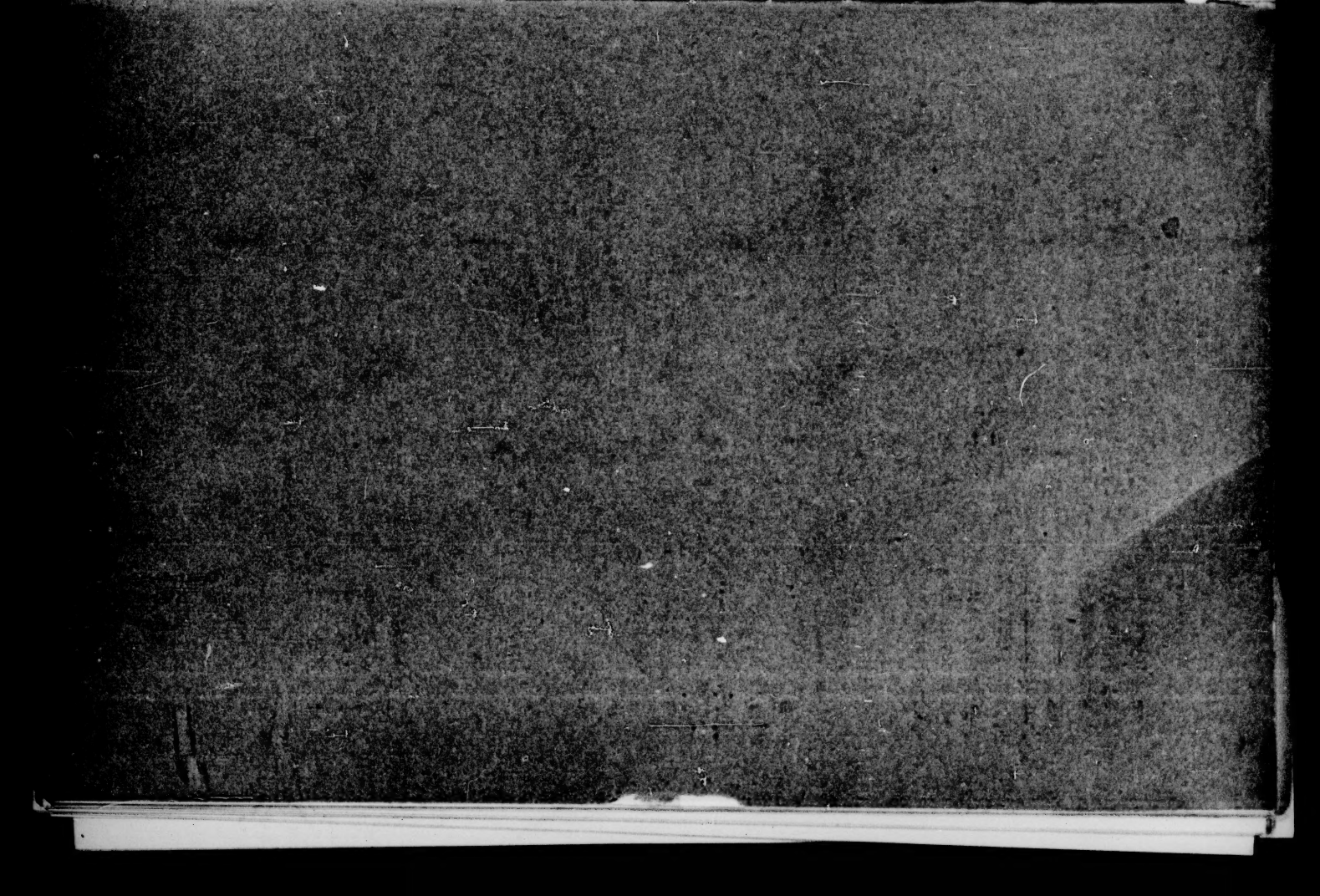

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And now come Ira Holmes and Edgar Holmes, bankrupts, by their attorney, James H. Roberts, and move the court to dismiss the appeal of Joel D. Harvey, receiver; Agnes F. Irons and Andrew H. Foskett, executrix and executor of the last will and testament of James Irons, deceased; the Third National Bank of St. Louis, National Gold Bank of D. O. Mills & Co., Union National Bank of Oshkosh, First National Bank of Waseka, First National Bank of Hastings, Minnesota, and Joseph Penn,

assignee of People's Bank of Belleville, because the said appellants did not file their respective appeal bonds in the Circuit court of the United States for the Northern district of Illinois, within the time allowed by the court, which appears by the certificate of the clerk of said Circuit court herewith filed, and so we respectfully submit said appeal should be dismissed, and the decree of the said Circuit court as to Ira and Edgar Holmes should be affirmed, which we ask may be done.

It will not be out of place, we think, to state to the court in this connection that the decree herein was entered in said Circuit court June 1, 1886 (P. Rec., 496), by which the defendants (except said bankrupts and other bankrupts), were decreed to pay certain assessments as shareholders in the Manufacturers' National Bank at Chicago. The bill was dismissed as to the bankrupts for want of equity, they having plead thereto their respective discharges in bankruptcy, which was held a good defense.

Some of the defendants below, Adams, Comstock and Lord, prayed an appeal to this court, which was allowed. (printed record, 502, 503.) They perfected their said appeal, and brought the record to this court, and the case is here docketed on their appeal.

Harvey, receiver, and others, complainants below, probably dissatisfied with the decree as to the bankrupts, also prayed an appeal (printed record, 503), which they never perfected, and which for that reason we ask to have dismissed.

Of course, the complainants below, who prayed an appeal but never perfected it, are brought here by the appeal of the defendants, Adams, Comstock and Lord, and they will file briefs in that appeal, and may perhaps

discuss this question of bankruptcy in that brief, which we submit they have no right to do; and to guard against that possibility, to protect our clients, and to fully inform the court about the case, it being in a somewhat peculiar condition as to the bankrupts; we have stated the facts, and believe our motion a proper one, and trust it may be granted.

If, however, the court shall consider that the case of Harvey, receiver, etc., *et als.*, is not before the court, so that it cannot dismiss it, because they did not file their respective appeal bonds in the lower court as required by it, then we respectfully submit that if counsel for Harvey and his co-complainants below argue this question of bankruptcy in their briefs, the court will exclude it because the question whether or not the bill was rightfully dismissed as to the bankrupts is not before the court. The record filed herein was certified to July 17, 1886, and the sixty days had not then expired during which Harvey, receiver, and others could have filed their bonds, hence the occasion for the short record or certificate of the clerk which we have filed.

Respectfully,

JAMES H. ROBERTS,

Attorney for Ira and Edgar Holmes.